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ABSTRACT

This document records oral and written testimony given at a hearing before a subcommittee of the U.S. House of Representatives Committee on Veterans' Affairs. The testimony pertains to veterans' preferences in hiring in the federal government and problems veterans are having in being reemployed after stints of active duty or during reductions in force (RIFs) at federal agencies. Those testifying included members of the House of Representatives, representatives of veterans' organizations, and officials of the Clinton Administration. According to the House members and the representatives of veterans' organizations, veterans have been faring badly in applications for employment and in protection against RIFs because bureaucrats do not support veterans and do not follow the law. The legislators have proposed bills that would provide for redress for veterans hurt by bureaucrats' failure to follow the law of preference in hiring. Administration officials, however, pointed out statistics that show that hiring of veterans has increased greatly during the past several years and that veterans have fared much better than nonveterans during RIFs. (KC)

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HEARING ON USERRA, VETERANS' PREFERENCE IN THE VA EDUCATION SERVICES DRAFT DISCUSSION BILL

HEARING

BEFORE THE

SUBCOMMITTEE ON
EDUCATION, TRAINING, EMPLOYMENT AND HOUSING

OF THE

COMMITTEE ON VETERANS' AFFAIRS
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

MAY 30, 1996

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HEARING ON USERRA, VETERANS' PREFERENCE IN THE VA EDUCATION SERVICES DRAFT DISCUSSION BILL

THURSDAY, MAY 30, 1996

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON EDUCATION, TRAINING, EMPLOYMENT AND HOUSING,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to call, at 10 a.m., in room 334, Cannon House Office Building, Hon. Steve Buyer, (chairman of the subcommittee) presiding.

Present: Representatives Buyer, Barr, Cooley, Hutchinson, Schaefer, Filner, Clyburn and Mascara.

OPENING STATEMENT OF CHAIRMAN BUYER

Mr. BUYER. Today, we've asked interested parties to present their views on how we're doing in the areas of veterans' preference and in the Uniformed Services Employment and Reemployment Rights Act, commonly called USERRA. We also have a draft bill that would make other changes in how VA administers its education programs.

I recently had the privilege of testifying on veterans' preference before the Subcommittee on Civil Service. In that testimony, I began by saying this is a bipartisan issue and I believe we should continue in that fashion. Federal agencies have long abused, I believe, veterans' preference in hiring, promotion and retention. Today, we'll see a piece of a videotape that shows they also violate the rights of veterans under USERRA. In my testimony, I made the point that I view the entrenched bureaucracy as the main source of the problem. There are thousands of managers and personnel that would like nothing better than to see veterans, in fact, go away. They resent their presence in the organization for a number of reasons. Maybe it's because these managers didn't serve and are embarrassed by the presence of those who did. Maybe it's because there are questions of women and minorities more representive as a growing proportion of the veterans. And maybe it's because they have other diversity goals which they believe take precedence over veterans. Maybe they resent the unusually small disruptions that are caused by periods of active duty. For whatever reason, I believe it can not continue. Our career civil servants must be made to follow the law, and their political bosses should be educated to watch closely for these unacceptable personnel practices. I believe there are no other choices.

Therefore, the issue that comes before us today is how do we structure a redress mechanism that will allow veterans to effectively pursue their claims of violations of veterans' preference statutes? Because most of that legislation lies within the jurisdiction of title 5 and the Subcommittee on Civil Service, I have asked the Chairman, John Mica, to appear today to give us their ideas on how this may best be approached. Before he begins, I would like to recognize the Ranking Member for any remarks he may have here today.

OPENING STATEMENT OF HON. BOB FILNER

Mr. FILNER. Thank you, Mr. Chairman. Certainly we welcome Chairman Mica here and the other witnesses and look forward to hearing them.

Veterans' preference in Federal employment as it applies during reductions-in-force is an extremely important subject. I take seriously the concerns expressed by certainly and especially the witnesses who believe that their veterans' preferences rights have been abused. And we want to see if veterans have the same protections and appeal procedures that are afforded other groups. The Civil Service Subcommittee, as you mentioned, held a hearing on this issue and is examining ways to correct the problem and, certainly, we want to support those actions. We look forward to working with Mr. Mica and other members of his subcommittee on their work with title 5.

And as you pointed out, however, this committee does not have legislative jurisdiction over title 5, but we do have legislative jurisdiction and full responsibility for the proper and effective implementation of the Uniformed Services Employment and Reemployment Rights Acts, known as USERRA. Several issues related to USERRA must be addressed by this subcommittee and our full committee.

As you know, many of our troops serving in Bosnia are citizen soldiers. That is, they are members of the Reserve or National Guard who were activated for this duty. They will be rotated back to their civilian lives including, of course, their civilian jobs. These brave men and women who have served willingly in a potentially dangerous and hostile area should experience no problems when they report back to their civilian employer. Unfortunately, we have not taken the actions necessary to ensure a problem-free return for these individuals. H.R. 2289, which the House has passed, has important technical amendments to USERRA. Unfortunately, it has been pending in the Senate for some time. I know the Senate Veterans' Affairs Committee held a hearing on this bill so, hopefully, we can get a quick approval of that legislation.

Also, Congress must amend the tax code so employers can fulfill their responsibilities to make pension payments on behalf of USERRA protected individuals. The USERRA law included a 2-year grace period during which the tax code could be amended. That period, however, ends in October. So, we must take action quickly. We included the necessary language in the Small Business Job Protection Act, H.R. 3448, which was passed last week by the

House. Again, we hope that quick action by the Senate to enact these protections will take place. So, we should all work on our own contacts with the Senate to do that.

Just let me make a final observation. A recent Supreme Court decision, the *Seminole Tribe of Florida* v. *Florida*, eliminates the right of USERRA-protected individuals who are State employees to pursue their reemployment rights in Federal court. In response to this diminution of veterans' rights, today I introduced H.R. 3538, the Veterans Job Protection Act, which would restore the right of protected State employees to sue a State government if they believe their veterans' employment protections have been violated. I hope the subcommittee chair will join us in this effort and schedule a markup as soon as possible so the employment rights of our troops returning from Bosnia and other areas will be fully covered.

Mr. Chairman, there are additional issues which are within our legislative jurisdiction that I hope this subcommittee will take up soon. H.R. 1593 introduced by Mr. Montgomery, the Veterans' Employment and Training Bill of Rights Act of 1995, should certainly be reviewed and considered for possible action. Section 4212 of title 38, should be which provides for veterans' employment emphasis under federal contracts, we should update and strengthen that provision.

Additionally, as at least one of our witnesses will point out, we have jurisdiction over the Disabled Veterans Affirmative Action Program. I have no doubt that the Federal agencies need to be reminded of their responsibilities under this program.

Also, the Veterans Readjustment Appointment Authority is under the jurisdiction of this subcommittee. Because the use of this authority is voluntary, I would like to do whatever we can to encourage Federal agencies to use this cost effective, speedy way of hiring veterans. Veterans, as we all know, make exemplary employees. They are uniquely competent and disciplined, and it is to the advantage of Federal agencies to hire as many of these men and women as possible.

Mr. Chairman, I thank you for the hearing and look forward to working with you on these very important matters.

Mr. BUYER. I would also like to recognize Mr. Cooley.

Yes, please.

OPENING STATEMENT OF HON. WES COOLEY

Mr. COOLEY. Thank you.

Thank you, Mr. Chairman. I want to thank you for calling this hearing and I want to thank as well our distinguished guests who are here to testify today.

I'm particularly interested in the status and the continued viability of the veterans' preference program. I read the article in the January issue of the American Legion magazine concerning the Executive branch violations or avoidance, I should say, of veterans' preference requirements. I received several comments from constituents regarding this article.

To serve our country, many veterans willingly forego the private sector education and training that non-veterans receive at an early age. The least that a country, at least this country, can do is to guarantee that every government for whom the veterans have dedicated their lives to protect will adequately consider their employment applications once they leave the service. This is particularly true of disabled veterans. Certainly other social goals, other hiring and promotional preferences should not crowd out employment opportunities for our veterans.

I want to thank you Mr. Chairman, again, for having this hearing.

Mr. BUYER. Thank you, Mr. Cooley.

Mr. Mica, thank you for coming to this hearing today and testifying. We appreciate your courtesy extended to myself and other members at your own hearing. Please, the floor is yours.

STATEMENT OF HON. JOHN L. MICA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. MICA. Well, thank you, Mr. Chairman. It's a delight for me to be here. I know the bipartisan manner in which you handle veterans' issues and the reputation you have for fairness. My brother served on this panel for 10 years, I think most of the time with former Chairman Montgomery. Dan was a member of the other side of the aisle. I salute you all. I salute you for your work and congratulate you also for holding this important hearing to examine the wide range of issues that are critically important to our nation's veterans.

Mr. Chairman, I have a lengthy statement which I'd like to have submitted in the record.

Mr. BUYER. It will be in the record.

Mr. MICA. I thank you for inviting me to testify this morning.

I know that our Subcommittee on Civil Service benefited greatly from your testimony at our hearings on veterans' preference, Mr. Chairman, and I hope my testimony this morning will be equally useful to your subcommittee as it examines the important issues that you're considering today.

As Chairman of the House Subcommittee on Civil Service, I've become very interested and concerned about the status of our veterans in the Federal workforce and how they're treated. I'll focus my testimony today on three specific topics that affect Federal employees who have served or are serving their country through military service.

First, I'll summarize for the subcommittee what we learned from our hearings on veterans' preference. Secondly, I hope to inform the subcommittee of the legislative steps which I am proposing and plan to introduce in legislation to strengthen and extend our veterans' preference and improve the economic opportunities for those who have served in our armed forces. Third, Mr. Chairman, I'd like to briefly touch on a serious problem that has recently come to the attention of our subcommittee and yours regarding the difficulty that many reservists today who work for the Federal Government have encountered as a result of their service.

The testimony at our hearing, Mr. Chairman, showed first of all that veterans' preference in the Federal workforce is often ignored or circumvented. It's continued viability is, in fact, threatened on several fronts. Let me cite the new policy, first of all, of permitting the widespread use of what is called single-position competitive levels during reductions-in-force, or RIFs, as they're also known. The proliferation of this technique is a great threat to veterans' preference today. A person occupying one of these so-called single-position competitive levels cannot compete against anyone else if the agency decides to eliminate that position. One of our witnesses explained how the use of this technique stripped him of his rights as a veteran. Of 50 employees covered under a certain RIF, this Vietnam veteran, who had been awarded the Distinguished Flying Cross, the Bronze Star, and multiple awards of the Air Medal was the only employee who was actually downgraded.

The use of single-position competitive levels has begun to proliferate throughout the Government. In one recent RIF at the U.S. Geological Survey, 97.2 percent of 1,100 positions were placed in unique competitive levels. So, you see how widespread this is and then within an agency, how it can be used in a detrimental fashion. This policy is not illegal, but it is very bad policy. It eliminates competition. It undermines the very basis of veterans' preference. The policy needs to be changed and that's one of the challenges that we face.

Other witnesses at the hearing testified that the trend to more decentralized hiring decisions will complicate the enforcement of veterans' preference. As individual agencies implement independent hiring procedures using different rules and guidelines, it will become more difficult for Congress and OPM to oversee and enforce veterans' rights. You might be interested in looking at the recent budget proposals by the Administration to even further downgrade or eliminate the traditional OPM as we know it. This will even acerbate the problem.

Our hearing also revealed widespread agreement that veterans do not have access to an adequate redress mechanism. In fact, both the American Legion and the DAV identified this as the number one problem that Congress needs to resolve.

I plan to introduce legislation soon to address some of these problems. We're working on it now. My bill will strengthen protections for veterans in RIF's and expand veterans' preference to jobs that are not now covered. In addition, it will establish an effective user-friendly redress system for veterans. Finally, my bill will eliminate artificial barriers to Federal employment for individuals honorably discharged from the military after 4 years of service.

Mr. Chairman, as I said earlier, witnesses at the Civil Service Subcommittee hearing on veterans' preference identified the lack of an adequate redress mechanism as the key weakness in our current veterans' preference provisions. My bill would also provide—for veterans who believe their rights have been violated—the choice of a judicial or an administrative remedy. If they choose the judicial remedy, they may file a complaint with the appropriate U.S. District Court. The administrative remedy in my bill will build upon the complaint procedures that are available to reservists under the Uniform Services Employment and Reemployment Rights Act of 1994. Also, we hope to build on some of the changes to that law that have been recommended by members of this panel.

Mr. Chairman, we have discussed our proposed redress mechanism with leading veterans' organizations and their reaction has been very positive. I look forward to continuing to work closely with those groups, and with you and other members, to refine the system through the legislative process and I would welcome your suggestions for inclusion in this legislation.

As I mentioned earlier, my bill will provide additional employment opportunities for all veterans. It intends to extend veterans' preference to non-political jobs, also in the White House and in the legislative branch of government as well as to GAO.

I am concerned that many veterans are barred from competing for a substantial number of jobs because of artificial restrictions which have been imposed to limit competition. Frequently, only individuals who are already civilian employees or who are already employed by the hiring agency can compete. The bill that we're introducing provides that any person honorably discharged from the military after 4 years of service cannot be excluded by these restrictions. This is not a preference, but it is an opportunity to compete on a level playing field.

Finally, Mr. Chairman, let me address another problem which has recently been brought to my attention and which you mentioned this morning. As members of your committee know, Congress has provided protection for private sector and Federal employees who serve in the Reserve or National Guard. Unfortunately, it seems that some Federal agencies have punished reservists and guardsmen and discriminated against them. My subcommittee staff has met with a number of these individuals and our subcommittee takes this problem very seriously.

Federal managers need to understand that the Executive branch of government is one enterprise with two basic functions, military and civilian. The President is the Chief Executive Officer of the civilian function and the commander-in-chief of the military. Thus, when a Federal employee temporarily leaves a civilian job in order to perform his or her duty as a reservist, they are simply transferring from one division of their company to another. Discrimination against these patriotic employees is absolutely unacceptable.

I thank you, Mr. Chairman and this committee and subcommittee for attending to this problem. Today is May 30 and it's the traditional Declaration Day or Memorial Day that we have celebrated in the past. In his speech on Monday at Arlington Cemetery, President Clinton reminded us, and I quote: "As we honor the brave sacrifices in battle that grace our nation's history, let us also remember to honor those who served in times of peace, who preserve the peace, protect our interests and project our values. Though they are the best-trained, best-equipped military in the world, they, too, face their share of dangers."

Mr. Chairman, one of the dangers our veterans and reservists face today is not being fairly treated in the Federal work place. I pledge my full support and cooperation in your committee and subcommittee's efforts to correct this situation. That ends my prepared statement. I see our time is running out, but I'll be glad to stay or return for questions.

[The prepared statement of Chairman Mica appears on p. 77.]

Mr. BUYER. Thank you, Chairman Mica.

I think this would be a good time to take a recess and vote and bring Chairman Mica back.

Mr. MONTGOMERY. Mr. Chairman?

Mr. BUYER. Yes.

Mr. MONTGOMERY. Mr. Chairman, I might not be able to get back.

Mr. BUYER. All right. Well then, that would be fine.

Mr. MONTGOMERY. —of North Carolina, we're going out to the Unknown Soldier's grave on May the 30th.

Your last comment about national guardsmen and reservists, that the Federal Government is probably one of the problems of letting them off and discriminating against these people in the guard and reserves that go on weekend training and also 15 days. That is a real problem.

Mr. Chairman, I believe the larger private enterprise companies in this country are doing a better job of letting these young men and women off and your reservists, letting them off, than the Federal Government. But for some reason, they do have a resentment. That certainly should be looked into and I want to just put that on the record and commend the gentleman for that. The Federal Government is one of our problems in letting reservists go to weekend drill and 15 days on active day.

Thank you.

Mr. MICA. I thank you. By your subcommittee and committee's action and also by our subcommittee, we're letting the federal managers and the federal executives know that this is a concern of the Congress and we hope that the direction this has been heading can be reversed.

Mr. BUYER. Thank you for your comments, Mr. Montgomery.

Thank you. We will stand in recess for a vote.

[Recess.]

Mr. BUYER. I'd like to bring this hearing of the subcommittee back to order.

I have some questions for you, Mr. Mica. I appreciate you coming back. I know you've got another hearing on your oversight of National Missile Ballistic Defense. We're going to release you as soon as we can. I appreciate you coming back.

Mr. MICA. Thank you.

Mr. BUYER. First of all, let me compliment you. I know that you're working with Congressman Fox of Philadelphia on the legislation to extend the veterans' preference to reservists and others in support of Southwest Asia. As you know, a lot of people in America think that that operation ended years ago, but it's still an open-ended commitment. Those who serve still are eligible for the medal. People who go there and come back are still eligible for that veterans' preference and, should be. We should also be mindful in our thinking that if, we have men and women in Bosnia receiving imminent danger pay, that we should also perhaps be mindful that there are others that will be eligible for the veterans' preference.

I think what you've come up with a good recommendation in your bill. I guess you can call it a second tier. If someone serves honorably for 4 years and have been discharged, your concept gives them [veterans] the necessary "status" for these type jobs, and it is not really a veterans' preference. You're creating a second tier there that's very imaginative and I compliment it. That's good creative thinking on how we can make sure that the veterans are, in fact, being taken care of.

One thing that has bothered me here and we've all been citing it, and your subcommittee laid mention to it. It is the culture. I believe that there is an anti-military bias within the federal bureaucracy. There is a cultural bias against those who have served in the military, and I'm not sure how we can properly address that. Jerry Solomon and I recently had an amendment on the House floor on the issue of prohibited personnel practices. We can begin to address and hammer those who don't follow the law, and you've hit the right point. The right point is whether it's in violation of crimes in our society and victims' rights and restitution. How does the veteran himself, address or obtain redress for that grievance? I applaud you for coming forward. I also appreciate your openness to all members of this committee to be helpful to you as your legislation moves forward.

But just give me a sense of how you think we're going to address the "culture" aspect within the federal bureaucracy?

Mr. MICA. Well, Mr. Chairman, I think we can address that in several ways.

Again, I commend this committee. It's part of your responsibility and jurisdiction to create an awareness. Sometimes we in Congress say, "well, who's going to fix it?" Well, it's our responsibility in this committee and my subcommittee's responsibility to see that we set the standard and send the message to this huge bureaucracy that we oversee. So, I think you've achieved some of that through what you're doing publicly through the work of this committee and subcommittee.

But it does take a specific education. As I said, it's going to be more difficult if you look at the Administration's proposal and you look at what's happened with OPM. OPM, Office of Personnel Management, is one of those agencies which is downsizing. It's privatizing and the functions are also being sent into the field, which may make sense in some of the dramatic changes we're seeing in the Federal workforce and reinvention of government. But with that, too, you lose certain employee protections. With veterans' preference and hiring of veterans and of hiring of the military, there has been no way to really enforce those requirements. Without an enforcement mechanism and with this change to decentralization, you're going to see even more of a problem.

So, it's going to take education, and it's going to take some legislation. That appeals process that we've outlined is very important because there's no way now, if you're denied access, to find a remedy, to find redress for your grievances. Also, once you're in the system and you've been violated, or veterans' preference has not been awarded, or you don't have the proper access—for a veteran or someone with military service, there's no existing adequate remedy.

Again, as you change the way personnel are managed, you must have the legislation and you must have the education in place. That's the remedy that we're seeking, and the educational aspect that is so important from your committee.

Mr. BUYER. When you mention education, I think of a very good point. Ignorance can feed a prejudice. Ignorance feeds into prejudices if we don't have that education process, or people don't have the dimension or the understanding. Those who have the prejudice seek legitimacy for their actions.

Since this issue is in your subcommittee, do you have the statistics, or the breakout of the Executive Office—whether it's the office of the President, or the Executive branch of government, of how many are veterans, political appointments of whom are veterans?

Mr. MICA. We haven't actually confirmed the figures, but what's been reported to us is that 4 percent of the men in the Executive Office of the President are vets. We don't know of any women veterans in the Executive Office of the President at this point. That's only one office. We found Government-wide, the number of veterans has been on the decline.

Statistics from our hearing showed that was the case in employment across the board. There are some reasons for this. The veterans' population is aging. Those with more service are retiring. Some are getting out and we're getting a smaller veterans' population. Part of it is societal and generational. Some of it may be a reflection of policy. Through Freedom of Information or delving a little bit deeper, we hope to get even better statistics on the employment practices.

Mr. BUYER. Well, I do have a concern when the President of the United States has the power and the ability to make his political appointees, around 900 political appointments—he has the opportunity to pick men and women of high credibility into the spheres of power and influence. And, if the numbers are so low who have the military dimension, it feeds into the lack of concern whether the veteran being taken care of.

I don't believe that the culture just raised its ugly head. I think it's been there for a while. But, in fact, if we have individuals that perhaps don't have the education level within the same spheres and powers of influence, then it permits that culture to raise its ugly head. And that's what we're experiencing right now.

Mr. MICA. That's why we get back to the appeals process, and it's so important that we make the remedies. Again, with the way personnel are being managed and the changes that we'll see in the future, it's critical that we have some protection in place for the future.

Mr. BUYER. One question in particular on the bill, before I yield to the Ranking Member, you suggest that your bill will provide "make-whole" relief? How do you propose to do that?

Mr. MICA. The make-whole provision that we've provided for would compensate the victim for any losses of pay and benefits that individual might have suffered. My bill provides relief whenever the veteran prevails in a case.

If the violation was willful, a veteran would receive an equal amount in liquidated damages under the proposal that we've set forth. So, we tried to build in some protections.

Mr. BUYER. I just have one more. Earlier, when you had mentioned administrative and judicial redress and their remedies, you suggesting in your bill that veterans first exhausted administrative remedies before judicial. Would that be correct?

Mr. MICA. We provide that you could have access to either.

It's a choice.

Mr. BUYER. All right. I'd like to have further conversations with you about that.

Mr. MICA. Again, I want to tell you, Mr. Chairman and other members of the panel, we haven't cemented any of these proposals in the final. We're very willing to work with you. Your panel has had much more extensive experience with the veterans' population than we have had, so we look to your guidance as we finalize this.

As you know, time is of the essence. So, we don't want to drag our feet. We would like to get this introduced as soon as possible, and then trying to reach a consensus is always a challenge in the House of Representatives. But we'll be glad to listen to your suggestions.

Mr. BUYER. The Chair now yields to the Ranking Member for 5 minutes.

Mr. FILNER. Thank you, Mr. Chairman.

Thank you, Mr. Mica. I appreciate your efforts to strengthen veterans' preference. Some of us, by the way, were a little worried when you first took over the committee. We read press accounts that you wanted to eliminate veterans' preference. So, we are glad to see that either you had a conversion or we——

Mr. MICA. No, that was a misinterpretation. Actually, I was concerned about some of the Administration's efforts in that regard and had said that veterans' preference, from the beginning, was one of my concerns. Somehow, Mr. Brown turned that around.

Mr. FILNER. Well, I read the press release too, and I would have interpreted it the same way as Secretary Brown. So, I hope maybe you have a new press secretary.

Mr. MICA. I don't have one. That may be the problem.

Mr. FILNER. Will you use veterans' preference in hiring there?

Mr. MICA. Yes.

Mr. FILNER. The hiring of a new press secretary?

Mr. MICA. I do have veterans working for me, but since I don't have a press secretary——

Mr. FILNER. Let me point out again, I appreciate your efforts there and we're going to be supporting those.

You have had a concern with the executive branch and the political appointees, and that is an appropriate concern. Nobody ought to justify any difference there. But I also have to look at our own house as the majority did when it first came in. The first bill we passed, H.R. 1, brought the House under the same hiring and employment rules as those applied to the executive branch and to the private sector. In spite of the fact that it was pointed out to the majority, veterans' preference was not included in H.R. 1. I hope that the two chairmen will use your influence with the majority and correct the omission of veterans' preference in the House.

Mr. MICA. Thank you for your comments. In fact, our bill in Section five, the proposed section, does not only apply to non-political jobs at the White House, but also covers the legislative branch. And as I understand the Congressional Accountability Act, it does require us to live under all of the other laws. So, I think some of these would apply.

Mr. BUYER. Would the gentleman yield?

Does it also include the GAO?

Mr. MICA. Yes.

Mr. BUYER. All right. Thank you.

Mr. FILNER. I think that was an oversight that was pointed out at the time, but I'm glad you're going to finally correct it. Again, you have to talk the same language in regard to ourselves as you do to the executive branch.

There are, by the way, statistics that should be in the record. I heard the Chairman talk about the Executive branch numbers. The statistics that I have seen, in fact, show that from 1990 to 1994—the latest statistics—we almost doubled the percentage of veterans amongst new hires. It went from 17 percent to 33 percent. Preference eligibles in the last couple of years went from 17 percent to 23 percent. Blue collar veterans in the new hiring went from 37 percent to 55 percent. So, let's make sure that, without any political bashing by one side of the other, we come to a consensus, at least, on the statistics and then proceed to remedy that.

It looked to me, just from the new hiring data, that that bias that you have pointed out may not exist, at least in behavior. In Congress, especially the House, which is so reflective of American society, the single biggest change in the last 4 years in terms of its membership is not in the age or the occupations or the education of the membership. The change is in veteran status which has gone from a great majority to a relatively small minority. So, the culture in the House itself, even in the vaunted freshman class, is a non-veteran culture. I am not a veteran. I chose, in fact, to be on this committee to make sure that I would correct any bias and work on behalf of veterans. We have a job to do not only in the executive branch, but within our own House.

Just, if I may, one last question. Mr. Mica, we are going to be taking up, I hope, some other veterans' preference legislation, and I hope we can get your support. H.R. 1593, for example, as I mentioned before, the Veterans' Employment and Training Bill of Rights, would allow certain veterans who meet the program qualifications to get priority of service in federally funded employment and training programs. We're thinking of a bill which would give veterans who own small businesses a preference in federal contracting and a meaningful small business loan program for veterans. Also, I'm having drafter legislation which would strengthen the law regarding federal contractors' responsibility to take affirmative action—don't turn off yet—affirmative action in hiring certain veterans.

So, these are bills that have either been introduced or may be introduced which I hope the two chairs, considering their concern for veterans' preference, will support.

Mr. MICA. I thank the gentleman. We'd be glad to work with him and look at all the individual pieces of legislation and support those where we can. You bring up some excellent points.

I did want to comment about Federal employment and percentages of those who have been employed. First of all, did you cite the statistics from 1990 to 1994? What's actually taken place—if you're talking about increases in number of people employed—is very few people have been employed when the Government has been downsizing, and you're correct, it did start in 1990 under the Bush administration.

Of the things we found particularly distressing to my subcommittee, almost all of the downsizing has taken place. There were 293,000 positions that were to be eliminated under this Administration in the past 2 years, with about 238,000 in civilian defense. So, the military and civilian defense have taken the brunt of it. Very few new employees have been brought on board, so that may account for some of the numbers.

The statistics I testified to earlier included the fact that there are fewer veterans percentage-wise and it has dropped in the total workforce. We find very few folks have been hired and the first ones fired are in the defense area. What's interesting too, if you look at the statistics of the civilian defense, you have many former military folks involved in that area and they're the first overboard.

Then the other thing that's disturbing in the RIFs is, we've seen the veterans cast overboard, and I cited an example in my testimony that's a concern to me. One of the recommendations that we have included in our provision is that veterans be given some preference and not be the first overboard in the event of the downsizing.

Hopefully, the statistics I've cited and the perspective I've given can shed some additional light for this subcommittee.

Mr. FILNER. If I may, Mr. Chairman, just one point in the interest of comity.

Maybe at some point we can all have a private meeting and agree on the statistics. You're pointing, for example, to total numbers. I was looking at new hires which says something about the present culture. We could interpret your statistics in view of the aging of the population. The people who are retiring are more likely to be veterans than the newer people. So, 50 percent of the Federal workforce who have retired in the past 5 years are veterans. That reflects the change in the nature and needs of the military and the society.

The bipartisan approach to fixing this problem would be encouraged by a bipartisan agreement on the statistics. As you know, we can use numbers in any way. I mean, you could hit Clinton and I could hit the Republican leadership, and we can have great games at that. But I think we ought to agree on the numbers and then look at them. Hopefully, as we proceed, we can do that.

Mr. MICA. Well, I thank you. I think we can work together and come up with some solutions. But we know that veterans do not have an appeal process. They do not have a redress of grievance process.

Mr. FILNER. I certainly agree with you and appreciate your efforts.

Mr. MICA. We know the workforce and the way we manage the workforce will change and is changing. We need to adapt to those requirements of our times, even if we're creatures of different experience.

I thank the Chairman. I thank the committee and the subcommittee for the opportunity to testify.

Mr. BUYER. Thank you. Debating statistics can be exhaustive.

The reason that I mention that it is, when I sat on the Personnel Subcommittee of the National Security Committee, we recognize that we're moving about 200,000 out of the military a year. And then when the statistics that you cite, Mr. Filner, about the increases [in the numbers of hires] you have to ask what jobs are they moving into? The reason I cited what I did within the Executive Office of the President, the Executive branch, regarding political appointees and the lower statistics, is those are the spheres of the powers of influence.

That was the only reason I made that mention.

There's Mr. Mascara and Mr. Cooley here. Let me yield to them if they have anything. I know you're being very patient, Mr. Mica. I appreciate it.

OPENING STATEMENT OF HON. FRANK MASCARA

Mr. MASCARA. I'd like to welcome Chairman Mica with whom I served on the Civil Service Subcommittee of the Government Reform and Oversight Committee. It was a delightful experience. Good to see you again, Mr. Chairman.

I would like to associate myself with the remarks of the Ranking Member. Although we allege to be bipartisan, oftentimes that's not the case. I think perhaps we should get on with solving the problem and forget about the specificities of who is and who isn't in this Government engaging in wrongdoing. That's my own terminology as it relates to veterans' preferences. I think that is pervasive across the Federal Government and not unique to the White House,, or even the House of Representatives.

Thank you, Mr. Chairman.

Mr. BUYER. Thank you.

Mr. Cooley.

Mr. COOLEY. Chairman Mica, I really appreciate you spending your time over here and informing us about this potential or prevalent problem. I don't think a lot of us realized that this was actually going on. I think we just sort of assumed that everything was okay. It's obvious that there is a problem here and that we need to address it. By bringing it up, it gives us an opportunity to discuss it and bring it out in the open and solve some of these problems.

So, as a member of this committee, I really appreciate you bringing this to our attention. I think we can resolve it to the satisfaction of our veterans and get some attention on this area if this is occurring or not. I want to thank you very much for being here.

Thank you very much, Mr. Chairman.

Mr. BUYER. Thank you.

Thank you, Chairman Mica. We look forward to working with your subcommittee to provide some meaningful relief for those who are not being treated fairly under veterans' preference and USERRA. And you're excused.

Mr. MICA. Thank you.

Mr. BUYER. For the record, as Chairman Mica had mentioned, this, is the true Memorial Day. I'd like to place into the record the Memorial Day statement by the Chairman of this committee, Bob Stump, into the record.

[The attachment appears on p. 61.]

Mr. BUYER. Thank you, Chairman.

If our next witness will come forward, please?

Professor Jon Siegel, Associate Professor of Law at George Washington University. Professor Siegel is here today to comment on a recent Supreme Court decision, *Seminole Tribe of Florida* v. *Florida* . It's my understanding that the decision may render USERRA unconstitutional as applied to a State employee's right to sue their employer in Federal court under USERRA violations.

I now recognize the Ranking Member for any remarks he may have.

Mr. FILNER. I appreciate Professor Siegel being here.

I really appreciate you being proactive in this regard and to alerting us with a very fine analysis. I took your analysis very seriously and incorporated it into the legislation which we introduced. I don't know if you've had time to look at it yet, but maybe you can comment on it in your own remarks.

Mr. SIEGEL. Certainly.

Mr. BUYER. Thank you, Professor. We welcome you.

Would you please explain briefly about this decision and what it means, and your views regarding the unconstitutionality of USERRA and possible remedies?

Please, you may begin.

STATEMENT OF JONATHAN R. SIEGEL, ASSOCIATE PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. SIEGEL. Thank you very much, Mr. Chairman.

I'd just like to start by saying that I'm very honored to have been asked to come testify today. I submitted a written statement which I hope will be placed in the record.

Mr. BUYER. Yes, it shall be placed in the record.

Mr. SIEGEL. As you've mentioned, I'm here to discuss a problem that has come up with the USERRA in light of the Supreme Court's decision. I'll try to address two questions this morning. First, what, exactly, is the problem? Second, what could Congress do about it?

The problem has to do with the way USERRA protects State employees. As I'm sure you know, ever since 1974, which is to say for 22 years now, the USERRA or its predecessor, the VRRA, has provided the same protections to State employees as to private employees. Employees, State or private, are entitled to the same right to be reemployed in their former jobs after leaving the uniformed services. And if any employer, State or private, violates an employee's rights under the USERRA, that employee may bring a lawsuit in Federal court to get the Act enforced and to get compensated for any lost wages or benefits. So, that's how things have worked since 1974.

The problem is that 2 months ago, the Supreme Court, in the *Seminole Tribe* case, held that Congress may not use its powers under Article 1 of the Constitution to authorize private individuals to sue States in Federal court. Such lawsuits, the Court said, violate the 11th Amendment to the Constitution. So, what did that mean for USERRA? Well, it doesn't mean that USERRA is entirely unconstitutional, but I believe it does mean that the Act is unconstitutional insofar as it authorizes State employees to sue States in Federal court. So, the States are still legally obliged to comply with the USERRA, but if they don't, State employees can't go to Federal court to get a remedy the way a private employee could. That's the problem.

Now, what could Congress do about this problem? Well, if Congress wants to preserve the principle that State and private employees should have the same remedies available to them under the USERRA, there is a technical fix that Congress could make to the statute that would achieve that. The key legal point is that although the Supreme Court has held that Congress may not, under Article 1, authorize private individuals to sue States, it has always been true that the Federal Government can sue the States. So, the fix that Congress could make is to say that when a State employee needs to sue a State under the USERRA, the suit should be brought by, or in the name of, the Federal Government.

This could work in two ways. First, you could actually have a Federal Government attorney bring the lawsuit. Again, as I'm sure you know, that already happens now in many cases under the USERRA because a unique feature of the Act is that it already authorizes the Federal Government to provide free legal representation to employees whose rights under the Act are violated. So, Federal Government attorneys already bring USERRA actions. In fact, that's how I got interested in this whole topic when I was at the Department of Justice before I became a law professor. I represented a reservist whose rights under the Act were being violated.

So, it's already common for Federal attorneys to bring these cases. It's just that currently, they are brought in the name of the employee. All you'd need to do is change the act so that these cases would be brought in the name of the United States itself. This device already exists elsewhere in Federal law. It's how things work now under the Fair Labor Standards Act. When a State fails to pay its employees the minimum wage, the Secretary of Labor is authorized to bring suit to get that redressed.

The other way this could work is that in cases where the employee hires a private attorney to bring the lawsuit, you could authorize that attorney to sue in the name of the United States. That's a technical legal device known as a qui tam action, which also exists in current Federal law under the False Claims Act.

I'll refer you, I think, to my written testimony for more of the legal details about how this would work. I think the key point to understand is that in practical terms, this really would not change USERRA litigation. This would not change the substantive requirements of the USERRA. It would not expose States to any new lawsuits or liabilities to which they weren't already exposed on the day before T3 Seminole Tribe. What this would just be is a technical fix that would restore the constitutionality of the system of USERRA remedies for State employees that existed from 1974 up to the day before *Seminole Tribe*. It would just restore the principle that State and private employees should have the same remedies available to them under the Act.

Since Mr. Filner mentioned it, I will just say that I had a look at the bill that he introduced yesterday and that's essentially what this bill does. It's a combination of those two techniques of authorizing the Attorney General to bring suit by the United States when a State employee's rights under the USERRA are violated, and also authorizing the employee to hire an attorney to do that on a qui tam basis.

So, I thank the committee and I'd be very happy to answer any questions that you might have.

[The prepared statement of Mr. Siegel appears on p. 82.]

Mr. BUYER. Well, Professor, I'm an attorney, but I don't know what a qui tam is.

Mr. SIEGEL. A qui tam action, Mr. Chairman, is a device that's existed since the Republic was founded, although it's not used as frequently today as it once was. But it's a device in which the Federal Government, by statute, authorizes a private person to bring an action in the name of the Federal Government.

The chief existing example of this currently is the False Claims Act. The False Claims Act provides that if anyone tries to defraud the Federal Government by presenting to it a false claim, then the Federal Government can recover from that person, I believe it's three times the amount of the false claim.

Mr. BUYER. All right, spell it.

Mr. SIEGEL. I'm sorry? Spell qui tam?

Mr. BUYER. Spell it, yes.

Mr. SIEGEL. It's Q-U-I T-A-M. It's two words.

And what the False Claims Act provides is that if any person knows of a false claim that was presented to the Government, then that person may bring a suit against the person who illegally presented the false claim. The suit is brought in the name of the United States. The recovery in that suit is then shared between the United States and the person bringing the action. This encourages people—say insiders at companies who know that the company is attempting to defraud the Government, it encourages those people to bring these actions so that the Government can recover its money.

Mr. BUYER. All right. Thank you.

Let me now yield to the Ranking Member for any questions he may have.

You're recognized for 5 minutes.

Mr. FILNER. I'm glad you have put the definition of qui tam in the record. That's the name of my bill, by the way, the Qui Tam Restoration Act. I didn't know that's what I was doing, but I'm glad I did it.

Again, I appreciate the proactive response to this. Many of us had not understood or realized the impact of that Supreme Court decision—and I'm sure it's going to have an impact in a variety of different fields.

Mr. SIEGEL. That's correct.

Mr. FILNER. We have chosen to deal with this in our field. I understand it affects several hundred veterans a year and would restore their right if this is enacted. I hope you have a chance to look at it from your own background because we put it together based on your information, but sometimes information gets lost, if I may say, in the translation. So, please look at it for any legal niceties that we may have left out. We'll see if it passes Constitutional muster. You said there are precedents and other statutes that seem to do the same thing.

Mr. SIEGEL. That's correct. The Fair Labor Standards Act method, in particular, has been around for quite some time. It's been before the courts. It has been challenged specifically on 11th Amendment grounds and it's been upheld, so far as I know, by every court that has considered it. The qui tam mechanism also exists and has been challenged on the 11th Amendment and has also been upheld. It doesn't have quite as extensive a track record, but has also, so far as I know, been upheld by every court that's considered it so far.

Mr. FILNER. Mr. Chairman, I think you'll establish your reputation far and wide in this nation when you schedule the qui tam hearings and have interviews all over the country trying to explain what that means. So, I look forward to working with you to make sure that our State-employed veterans don't face any problems when they return to their civilian jobs.

Mr. BUYER. Bob, I can't wait until my mother challenges me at Scrabble on this one.

Can I break that up? What's qui?

Mr. SIEGEL. These are Latin. I don't know if they'd be allowed in your Scrabble game.

Mr. BUYER. Oh, it's Latin. All right.

Mr. FILNER. I can't wait until I challenge you in Scrabble.

Mr. BUYER. All right.

Mr. Mascara.

Mr. MASCARA. Thank you for asking what qui tam means. You have whet my appetite for further discussion.

Is this somehow associated with when you have one taxpayer blowing the whistle on another taxpayer with the Internal Revenue Service as it relates to recovery of monies due the Federal Government?

Mr. SIEGEL. I'm not fully familiar with that. I believe it's a little different in that—well, I don't really know the answer. I believe that the IRS may pay some reward to people who ferret out tax fraud. But as far as I know, it isn't quite the same mechanism of having the person who discovered the fraud actually bring a lawsuit. I don't think that such suits are brought under the False Claims Act.

Mr. MASCARA. Thank you, Mr. Chairman.

Thank you, Professor.

Mr. BUYER. Mr. Cooley is recognized for 5 minutes.

Mr. COOLEY. Professor Siegel, I'm not an attorney so I'm going to probably ask you things that are very easy to answer.

You talk about a technical fix. Qui tam, isn't this really sort of a move, from what I understand from your explanation, of a way to get around the 11th Amendment? Isn't this a process that could be interpreted as a way to circumvent the 11th Amendment and its understanding in order to achieve some type of a goal or a fix to the 11th Amendment understanding?

Mr. SIEGEL. Well, I think the answer to that is that the 11th Amendment has always been a very technical doctrine. And it very frequently happens that one lawsuit that is forbidden by the 11th Amendment may be quite similar to another in practical effect, and yet this other one will be permitted.

So, just to cite the most outstanding example, the Supreme Court mentioned in *Seminole Tribe* that it is forbidden for a private individual to sue a State even if all the individual wants is an order that the State comply with its obligation under Federal law in the future. And yet, in a footnote in the same opinion, the court said, but of course we held long ago, and it's still true, that an individual may sue a State officer and get an order that that officer comply with Federal law, even though the effect of that other lawsuit is identical in practical terms to the law suit that is forbidden.

So, while I certainly appreciate the concern that you've raised, I think the answer is that it is quite often true in the 11th Amendment field that what seems to be a very small technical change can make a lawsuit constitutional even though it's quite similar in practical effect to one that is forbidden.

Mr. COOLEY. Does this not circumvent States' rights under the 11th Amendment?

Mr. SIEGEL. Well, it would certainly provide for a remedy against the States. Now, it is, of course, up to the committee and ultimately to the Congress to decide whether as a policy matter it wants to preserve the ability of State employees to get that remedy against the States in the event that the State violates the employee's rights under the USERRA. I hope it's clear that I'm not here to push any particular policy outcome. I'm just here to say that——

Mr. COOLEY. I didn't mean to suggest that. I'm just trying to be educated here.

Mr. SIEGEL. Sure. I'm just here to say that if preserving that remedy is what the Congress wants to do, I think this would be a mechanism that would permit that to happen. The reason it would not be a problem is that it has always been recognized for well over a century now, that suits by the United States against the States are permitted under the Federal system.

Mr. COOLEY. Thank you.

Mr. FILNER. If the gentleman would yield, Mr. Cooley, you bring up, obviously, a very important—I mean, we're treading here on constitutional issues and States' rights. But the policy issue for me, and I think that Mr. Siegel is trying to point out, is should veterans who happen to be employed by State governments or such entities have any less protection than veterans employed by any other entity? That seems to me the policy issue for us as we move forward here.

Mr. COOLEY. I think when we talk about veterans, there's no question about your concerns and mine as well. I'm just sort of trying to get the overall, does this apply to other areas as well? Is there some other method that we may invoke that will protect our veterans and still not move out into another area?

I mean, I don't know how expansive this particular concept is and whether it's going to go into other areas as well. That was my concern.

Mr. FILNER. It's pretty interesting as we pursue this.

Mr. COOLEY. Sometimes, we do one thing to correct something and we create a tremendous problem someplace else. So, that was my concern. The legal part of it, I don't really understand.

Mr. FILNER. No, I agree. Neither of us being lawyers, we can have very important questions. It's a very interesting issue. What constitutional impact does it have on other areas? It's worthwhile to talk about.

Mr. SIEGEL. Well, I think in each area that the *Seminole Tribe* decision might affect, it will certainly be up to Congress to balance the State and private interests that are involved.

Mr. BUYER. You know, I'm reading the 11th Amendment here. I just happen to have it right here if anybody cares, so I can understand this qui tam stuff.

You know, before I get into this, has anyone ever brought a qui tam suit against a State?

Mr. SIEGEL. Yes, Mr. Chairman. I refer to a couple of suits that have recently been brought in my written testimony. I cite them—this is at footnote 24 on page six of my written testimony. There have been suits against—I see here I've cited one against the University of California which is a State agency, the University of Texas, the State of Ohio. So, there have been several, and in those lawsuits the states said, "well, wait a minute. This violates the 11th Amendment." And the court said, "no, when one of these qui tam actions is brought, the true plaintiff is the United States. And so, the 11th Amendment is not violated."

Mr. BUYER. The 11th Amendment: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of a foreign state."

So, in light of this decision, Congress may not abrogate States' immunity?

Mr. SIEGEL. When it acts pursuant to its Article 1 powers. The Supreme Court said it's still possible for Congress to do that when it acts pursuant to its powers under Section 5 of the 14th Amendment.

Mr. BUYER. Would you agree though that the Court's decision was written broadly?

Mr. SIEGEL. I think that's very true, yes.

Mr. BUYER. Okay. Would you also concede that the Congress has broad and sweeping powers within its ability to raise the Army and to send the Navy afloat?

Mr. SIEGEL. I think that's certainly true.

Mr. BUYER. I'm not so sure if the Supreme Court would rule the same. I'm not here to quibble with you, Professor, but, I'm not so sure we should say that here is the ruling of this particular case and it came under the Article 1 powers and it dealt with Congress. It was very narrow, yet the decision was written broadly. And the Supreme Court—right across the street over here has been very broad in giving—actually, granted the Congress great leeway when it comes to raising the armies and how we move out. Great leeway not only to the Legislative Branch, but also to the Executive branch with regard to the Commander-in-Chief and the decisions that are made within the Uniform Code of Military Justice. How things are implemented in the rules in the conduct of soldiers. They all recognize that that is a completely different environment than the civilian population.

I'm not here to quibble with you, Professor, but would you agree that I'm sure that there are others that may not necessarily agree with your present interpretation here today?

Mr. SIEGEL. You know, I have to say, personally, I find the argument that you've just made quite persuasive. I would think that if any of Congress' Article 1 powers carry with them the ability to abrogate States' sovereign immunity, certainly, the military powers should be first on the list.

I guess I can only say that my professional opinion, after reading the *Seminole Tribe* decision, is that the Supreme Court has written it so broadly that it really sweeps within it all of Congress' Article 1 powers. Perhaps if a case worked its way back to the Supreme Court, we might discover that they didn't really mean what they said. I think I could certainly predict that any lower court judge faced with the argument that you have just made, Mr. Chairman, would say, "well, that's a very good argument but I'm bound to follow the Supreme Court opinion and it seems quite clearly to preclude it."

Mr. BUYER. You know, Attorney Generals are elected. Can you imagine the first Attorney General to bring this one, not to pursue?

If you have an individual that's in the National Guard who is activated, for whatever reason, matters of national security, and then comes back and their own State, up against this bias that we've talked about here today and now they've threatened their own job? Are States going to use this particular court ruling to hide behind? You know, good luck.

Mr. SIEGEL. It is, of course, possible that States might choose not to assert their immunity from these suits. I might mention that the suit that I had when I was at the Department of Justice was against a State. It did not assert a complete 11th Amendment immunity from the entire suit. It claimed that it was immune from—how can I say this? We obtained back pay for the veteran under the Act, and then the question in the suit was whether the veteran should receive interest on the back pay. The State said "well, we're immune from that." So, there was a partial assertion of 11th Amendment immunity in that case. But as you say, there was not an assertion of full 11th Amendment immunity from the whole suit itself. So, it is certainly possible that States could choose not to assert their immunity in these cases.

Mr. BUYER. All right. The last question I have to maybe be helpful with the actual mechanics of the suit itself. The individual that has been wronged against the State, it's [the suit] brought in the title of whom and who seeks to prosecute.

Mr. SIEGEL. Well, what happens—I presume you're referring to this qui tam mechanism. What happens in those suits, typically, they're called these days—under the False Claims Act, they're called United States—and then we have some more Latin—ex rel, and then the name of the person who is claiming the problem versus the defendant.

I'm sorry, does that answer the whole question or what more did you want to know?

Mr. BUYER. I don't know. I'm more confused now than what I was. Steve Buyer——

Mr. SIEGEL. Right.

Mr. BUYER (continuing). Has been wronged by the State of Indiana. I went on active duty with the National Guard. I come back and now I want my job. I want my remedy. I then have to bring my action against the State of Indiana using USERRA.

Mr. SIEGEL. Yes.

Mr. BUYER. I mean, I can't picture the Attorney General from Indiana filing a motion in Federal court, as I go down to Federal court, saying "no, you can't sue the State of Indiana using this Federal statute." Okay, that would set up this thing you're talking about today that could take it all the way to Supreme Court, okay?

Mr. SIEGEL. Yes.

Mr. BUYER. I can't visualize the Attorney Generals doing that? But you're saying, and your legal opinion is that that, in fact, could happen.

Now, I'm trying to get clear here. Your recommendation to remedy that is that the Congress has the ability to tell private citizens that they can bring a suit in the name of what?

Mr. SIEGEL. Of the United States.

Mr. BUYER. Of the United States.

Mr. SIEGEL. Of course, I should point out, the first thing you could do under the USERRA is bring the complaint to the Secretary of Labor. The Secretary of Labor would try to work it out. I understand that most claims are worked out at that stage. Then if it wasn't, you could ask that it be referred to the Attorney General. The Attorney General, if reasonably satisfied that your claim had merit, could bring the suit in the name of the United States.

Mr. BUYER. Right. Also referred to the Department of Justice. I mean, we've been shown that like DOJ's only picked up on 41 percent of the cases that have been referred. We have individuals out there who are serving, whether in the Federal Government or in the State government, and they're being discriminated against.

Mr. SIEGEL. Well, of course, if all that failed, then what you would do is, you would bring a lawsuit. Under this suggestion, the lawsuit would be called United States ex rel Buyer versus your employer, the State of Indiana or some agency thereof. Under the statute that was introduced yesterday, you would send the documents to the Federal Government, I believe to the Attorney General, who would have the option of picking up the suit even at that time. But if that option were declined, you, or more particularly your attorney, would continue to prosecute the suit on behalf of the United States.

Mr. BUYER. All right. I don't have any further questions. If anyone has questions based on those questions, good luck.

Mr. MASCARA. Well, just that is this in conflict with the 10th Amendment? It's been some time since I looked at the Constitution. Are States' rights——

Mr. SIEGEL. The 10th Amendment is a little different. The 10th Amendment would have a potential effect, perhaps, on Congress' ability to pass the underlying regulation of State conduct. So, for instance, the 10th Amendment could conceivably lead to the conclusion that Congress can't require States to reemploy people who leave the uniformed services. But that is not currently true under current Supreme Court doctrine.

late his rights" and that would be the end of the case. That's all the further it would go.

Well, I think as time evolved and this happened more and more, it kind of gave a green light to agencies saying, "well, gee, you know, we're not going to enforce anything. There's no redress here. There's no remedies. There's no rights for redress, and therefore, we'll do pretty much what we want to do in terms of veterans' preference."

We've argued, you know, that there should be some form of a complaint mechanism more substantial than that for a number of years with no luck. Somebody mentioned earlier this morning, and I think this makes this issue that much more important—I think it was you, Mr. Chairman—that with the delegation of responsibility to hire, it's going to make it that much more difficult for the Congress, for the veterans service organizations, for OPM or anyone else, to actually enforce veterans' preference, even if they wanted to. Under the old system of veterans' preference since 1944, there was a certificate of eligibles from which an agency was supposed to hire. Now, what's going to happen with the delegated authority is that each agency will have their own right to develop their own register of eligibles. And then from there, they'll decide how they want to pick and choose from their register. Again, without a strong central OPM system, and we believe a strong complaint mechanism, it's going to make it that much easier for those agencies who want to violate veterans' preference, or circumvent veterans' preference to do so. We're hoping that something can be done real quick on the whole process of putting together an appeal process.

I can't disassociate the veterans' preference issue and appeal redress from the disabled veterans' affirmative action program. Like veterans' preference, if a veteran comes to us and says, "I believe the agency has violated my rights under affirmative action", that individual has no redress. There is no appeal. We went so far as to be an amicus in a case before the Federal Labor Relations Authority back in 1988 or '89 at which time the argument was made that veterans' preference must apply in a promotion under affirmative action. It allowed FLRA to rule very narrowly and say that there is no veterans' preference in promotions and there never has been. But they avoided the issue of what does affirmative action mean vis-á-vis promotional opportunities within a Federal department or agency.

So, that somewhat mooted the whole issue of whether or not an individual did, indeed, have some sort of an appeal right. They appealed not under a specific appeal right under DVAP, but rather through a grievance process available in the agency itself through the negotiated union contract.

At the risk of opening up Pandora's box on the statistics thing, I believe I must because I think as you pursue the data, I think we need to keep something in mind. There are two classes of veterans right now: those who are eligible for preference and those who are not eligible for preference. Now, when looking at the data, I think we need to know how many preference-eligibles are hired, and how many non-preference-eligible veterans are hired. If we take a conservative number of 150,000 discharges a year since 1975

Mr. MASCARA. Well, isn't that what Chairman Mica's bill really does?

Mr. SIEGEL. I have to say I'm not familiar with Chairman Mica's bill. I'm sorry.

Mr. MASCARA. Thank you.

Mr. BUYER. Thank you, Professor, for your testimony here today.

Mr. SIEGEL. Thank you very much, and I thank the committee.

Mr. BUYER. Our next panel has representatives of the veterans service organizations. Today, we have Mr. Kahn from the Veterans Economic Action Coalition. We have Mr. Naschinski who will represent the American Legion. Mr. Ron Drach is with us from the DAV, and Mr. Crandell will speak for the VVA.

Ron, you can call me Buyer to get back at me, okay? Is that fair?

Mr. DRACH. Fair enough, sir.

Mr. BUYER. As a matter of fact, I'll let you go first.

Mr. DRACH. Thank you, sir.

STATEMENTS OF RONALD DRACH, NATIONAL EMPLOYMENT DIRECTOR, DISABLED AMERICAN VETERANS; GERALD KAHN, VETERANS ECONOMIC ACTION COALITION; EMIL NASCHINSKI, NATIONAL ECONOMIC COMMISSION, THE AMERICAN LEGION; BILL CRANDELL, DEPUTY DIRECTOR, GOVERNMENT RELATIONS, VIETNAM VETERANS OF AMERICA

STATEMENT OF RONALD DRACH

Mr. DRACH. Mr. Chairman and members of the subcommittee, thank you for conducting these hearings today and allowing us to testify.

I have to admit my ignorance. I thought qui tam was a province in Vietnam, so I learned something new today also.

Mr. Chairman, I'm going to kind of focus in more on the appeal redress process rather than some of the other issues today because of the time involved. As you know, we've had this discussion before, that as long as I've been around as Employment Director for the DAV which is 21 years, there has not been an effective appeal mechanism or redress mechanism available to those veterans who believe that their veterans' preference rights may have been violated. Now, in current statute, of course, there are some protections accorded in the reduction-in-force through the Merit System Protection Board appeal process. But that's not necessarily generally focused on veterans' preference, per se, but rather any Federal employee who believes his or her rights under a reduction-in-force have been violated may avail themselves of that appeal process through the Merit System Protection Board.

But in the history of this, since I first started working in employment issues in 1972, if a veteran would complain to us that they believed their rights had been violated, we, in turn, would right to then the old regional administrator, or the regional VFER, Veterans Federal Employment Representative, saying that this allegatión is here. You know, please investigate. The VFER, who then was with Civil Service Commission, would go to the agency and say, "here's the allegation. Tell us what happened." The agency would write back and say, "this is what happened. We didn't viowhen veterans' preference actually had its demise for peace time and multiply that by 20 years, that's roughly three million veterans that have been discharged in the last 20 years. Relatively few of them have preference, but a lot of them are classified as veterans.

If you look at the current VRA, for example, you can have a non-preference-eligible be eligible for a VRA appointment and knock out a preference-eligible from the running for a particular job. But that person wouldn't be counted as a preference-eligible, but might be counted as a veteran. So, I think, you know, there's a lot of—I'm not sure exactly how OPM is tracking that, or if they're tracking that. But I think we need to find out how many preference-eligibles there are and how many veterans there are that don't have preference-eligibility status.

[The prepared statement of Mr. Drach, with attachment, appears on p. 91.]

Mr. FILNER. By the way, the statistics released by the Federal agencies do make that distinction.

Mr. DRACH. In the annual report.

Mr. FILNER. For example, the increase in hires went up from 17 percent to 23 of preference-eligible vets in the last couple of years.

Mr. DRACH. Of preference-eligibles.

Mr. FILNER. So, you're right that we ought to look at that, but those are kept.

Mr. DRACH. Very good. Thank you, Mr. Chairman.

Mr. BUYER. I hate debating these statistics, but it's going to reflect because a lot of those guys that are getting kicked out right now are also ones that served in the Persian Gulf War.

Mr. DRACH. Absolutely.

Mr. BUYER. That's why. And the reason the statistics keep getting cited and I didn't make the differential between preference and non-preference is, is because we're talking about the culture in and of itself out there in the Federal Government. Whether there a veterans' preference veteran or a non-preference veteran, it's getting that dimension and understanding out there within the Federal Government and the bureaucracies that is very helpful. That's why I mentioned that ignorance breeds into the prejudice. When the veteran is sitting there with colleagues in the room, he's there that can share an experience and brings an understanding that is very important. That's the only other comment I'd like to make.

Mr. DRACH. I understand.

Mr. BUYER. Mr. Naschinski, you're now recognized for 5 minutes.

STATEMENT OF EMIL NASCHINSKI

Mr. NASCHINSKI. Chairman Buyer and distinguished members of the subcommittee, the American Legion appreciates having this opportunity to share with you our views on the reform of veterans' preference and the current status of the Uniformed Services Employment and Reemployment Rights Act, or as it's more commonly known, USERRA.

As you know, Mr. Chairman, the provisions of veterans' preference law have become nothing more than a hollow promise to those who fought to protect and preserve the American way of life. The American Legion believes there are several reasons for this. First is the fact that many federal managers understand neither the reason for granting veterans' preference to those who fought to keep this country free, nor their responsibilities under the law. That problem is compounded by the fact that many veterans are unclear about their rights under veterans' preference law.

Two other things that many federal managers do not seem to understand is the fact that, number one, veterans' preference is completely neutral with respect to the veterans' sex or ethnicity. Second, in order for veterans' preference to come into play, the veteran must be completely qualified for the job for which he or she is applying.

Another problem stems from the fact that affirmative action programs and the Civil Rights Act of 1964 provided protection from discrimination for women and minorities. That legislation also required Federal agencies to establish goals and timetables for the recruitment of women and minorities. Because veterans' preference is an earned entitlement and not an affirmative action or a civil rights program, there have never been any quotas for the hiring of veterans. As a result, there was, and is, very little incentive for Federal agencies to hire veterans. While the American Legion does not oppose increasing employment opportunities for women and minorities, we do object to the fact that all too often, that goal has been accomplished by denying veterans their rights under the law.

Mr. Chairman, the American Legion believes that the major problem with veterans' preference is the fact that veterans have no protection from discrimination. Unlike women and minorities, veterans have never had an adequate redress system for instances of discrimination. Because of that, federal managers have routinely discriminated against veterans. Their rationale for breaking the law is that veterans' preference prevents them from hiring the most qualified person for the job or because they feel that it discriminates against women and minorities. As a result, many federal managers have become extremely adept at finding ways of circumventing veterans' preference rules and regulations.

If legislation is introduced as a result of this hearing, it must provide a clear, independent and user-friendly mechanism that can be utilized by veterans who believe that their rights have been violated. Because the American Legion fails to see why Federal officials who have broken the law should be protected by sovereign immunity, we believe that veterans must be given the right to sue any federal manager that they believe has violated their veterans' preference rights. Federal managers should also be held accountable if they allow policies to develop that establish a pattern or practice of discrimination against veterans, especially disabled veterans, in hiring and retention.

We also believe that if legislation comes out of this hearing, that it must contain language that will require Federal agencies to be certified annually as being in compliance with all veterans' preference statutes. Any agency that is not in compliance with the law should have its funding impounded until such time as appropriate corrective action has been taken.

Mr. Chairman, the American Legion has reviewed the first annual report to Congress on the status of USERRA. While we believe this important statute is functioning as Congress intended, we do have one request. Currently, H.R. 1469 and H.R. 3104 are being considered by the House. Both bills seek to amend the Internal Revenue Code of 1986 and will prevent those members of the reserve component who have been activated for service in Bosnia from being penalized with respect to their civilian pension plans. We request, Mr. Chairman, that you and the members of the subcommittee support those two important bills.

In closing, Chairman Buyer, the American Legion wishes to thank you for your leadership in addressing the problems that have been discussed today. You can count on our continued cooperation and support as we redouble our efforts to once again make veterans' preference the meaningful entitlement that Congress intended it to be.

Mr. Chairman, that concludes our statement. We'll be happy to respond to any questions you or members of the subcommittee may have. Thank you.

Mr. BUYER. Thank you for your testimony.

[The prepared statement of Mr. Naschinski, with attachments, appears on p. 101.]

Mr. BUYER. Mr. Kahn, you're now recognized for 5 minutes.

STATEMENT OF GERALD KAHN

Mr. KAHN. Thank you.

Mr. Chairman, distinguished members of the subcommittee, we are thankful for your leadership on this issue, but perhaps any discussion of any aspect of veterans' preference should begin with the reiteration of why this issue is so important to veterans and other concerned citizens, including those who may never apply for a position in the Federal Government.

We believe the issue of veterans' preference is essential for several reasons. First, in the federal sector, veterans' preference in hiring and retention is the law. If there are individuals who are opposed to the provisions of the Veterans' preference Act of 1944, they should seek to eliminate the offending—law and not ignore it.

If it is found that the law is not being obeyed, then Congress and the President should take all necessary steps to ensure that the law is enforced, including the institution of sanctions. Since there is little likelihood of a large number of positions being filled in the near future, the key issue facing preference—employees in the Federal service are the actions being taken to downsize the Federal Government. It matters not whether an agency calls it downsizing or restructuring, reduction-in-force by any other name is still a reduction-in-force.

The best known example of the designer RIFs is now the infamous United States' Postal Service restructuring. Amongst some of the reasons given by the post office for the restructuring and not holding a RIF was it was too likely to have an adverse effect on minorities and women in the workforce. A RIF would have resulted in laying off more recently hired workers whose families would be devastated. These sentiments, of course, sound like reasonable considerations. However, unlike adverse actions, RIFs are not aimed at removing particular individuals. Rather, they are directed solely at positions. OPM has issued regulation and guidance implementing a statutory mandate which with respect to the postal service afforded retention preference and appeal rights to the board only for preference-eligible employees affected by the RIF. Postal Service employees who were preference-eligible employees are covered under OPM regulations and these regulations are not applicable to non-preferential employees in the post office.

It seems the U.S. Postal Service is not alone in its endeavor to manipulate the law. The military service, Army, Navy, Air Force and Defense Logistics Agency employ approximately 284,487 of the 560,028 veterans employed in the competitive service. This fact has not gone unnoticed. In 1990, GAO found that on May 11, 1990, the Assistant Secretary of Defense forced—personnel, required that military services do a formal impact analysis before a RIF to assess and guard against any disproportionate impact on EEO groups.

In 1993, a GAO statement of provided workforce planning permits an agency to examine the impact of various options for reducing the workforce and making alternative choices of certain impacts, like the loss of key expertise or disproportionate effects on women and minorities are undesirable.

Is GAO offering legal advice to agencies? Is GAO telling agencies that it's okay to ignore the law and manipulate the workforce prior to the announcement of a RIF so that the impact will fall on preference-eligibles and senior employees? Under their rules, GAO can target certain functions of groups or people and eliminate preference-eligibles' ability to bump or retreat if they have an overall performance appraisal below 3.0.

I see my time is running out. I'll address that later.

In yet another GAO report, we found that we raised this matter up today to recognize that the effects of reduction-in-force in women and minorities will remain an important issue as the Department of Defense goes through its downsizing action, as civil agencies experience similar actions.

Veterans' Economic Action has been speaking with preference-eligible employees at the Department of the Army's—Arsenal and the New York Defense Logistics Agency in Garden City, New York. Based on our conversation, it just seems that individuals who were vulnerable to RIF procedures are promoted, transferred to safe positions or sent to details to get experience in specific positions prior to the announcement of a RIF. We believe that this is a disturbing pattern that should be investigated and that a freeze should be imposed on all personnel actions for 2 years prior to a RIF.

Mr. Chairman, that concludes our statement. We'd be happy to answer any of your questions.

[The prepared statement of Mr. Kahn appears on p. 117.]

Mr. BUYER. Thank you.

Mr. Crandell, you are now recognized for 5 minutes.

STATEMENT OF BILL CRANDELL

Mr. CRANDELL. Thank you, Mr. Chairman.

Mr. Chairman, members of the subcommittee, Vietnam Veterans of America appreciates the opportunity to present its views and will focus on the challenge of enforcing veterans' preference. VVA is appreciative of efforts of the members of this subcommittee and especially your own recent statements, Mr. Chairman, on the importance of veterans' preference.

Federal agencies have admitted for years that they cheat on veterans' preference to hire non-veteran men and women as often as 71 percent of the time. There is no remedy. A cheated veteran has no recourse. Violations of veterans' preference and affirmative action provisions should be considered prohibited personnel practices.

Federal agencies routinely hold training to explain the rules and the point of affirmative action hiring for women and minorities, as well as on topics that range from sexual harassment, cultural diversity in the workplace. It would harm no agency to learn the whys and hows of veterans' preference.

The major difficulty in enforcing veterans' preference is rooted in the current class of senior bureaucrats. A great many have disliked veterans' preference throughout their careers in civil service because they did not serve in the military and think of those of us who did as simply stupid.

Part of the culture of bureaucracy is that nothing is worse than a reduction-in-force. People lose their jobs with no real warning. RIFs roll through agencies like avalanches and those in the way see no rational intelligence behind them.

The process is complicated, though it was designed to be straightforward and mechanical. Congress made veterans' preference a significant protection for holding onto jobs during RIFs along with seniority and good job performance evaluations. Veterans' preference counts in a veteran's behalf during the first sort and in the second round of competition when protected employees bump others out of comparable jobs. The RIF rules were carefully crafted. The combination of veterans' preference, seniority and performance evaluations should work to make a RIF spare employees with records of useful service and pare away those whose contributions have been less. The three criteria reenforce each other.

Bureaucrats, often with their own protégés, have devised gimmicks for skirting the RIF rules. Veterans have been an easy target for managers who want their own people left behind when the dust has settled. Veterans' preference has not been enforced since the creation of the Merit Systems Protection Board in 1978. MSPB never rules in favor of a veteran in a veterans' preference case. MSPB denies that it has jurisdiction in cases involving job applicants and consistently refuses to enforce title 5 USC on behalf of veteran employees.

The Office of Personnel Management has delegated away its authority over Federal personnel practices. Congress has reinforced this by cutting OPM's budget so that OPM can not enforce title 5 effectively. The Court of Veterans Appeals (COVA) has no jurisdiction at present and has limited its own legal horizons over the years to compensation benefits awarded by the Department of Veterans Affairs.

Yet, some institution must be adapted to enforce the law. There must be uniform standards within the decentralized system. The key must be access to the courts with clear laws spelling out jurisdiction, remedies and penalties. MSPB could be given sharply delineated new rules amounting to a major reform that would make it workable for the enforcement of veterans' preference.

Congress could likewise adopt legislation empowering the Veterans' Employment and Training Service to effectively enforce legislation requiring Federal agency employers to obey Federal laws, making veteran preference part of the merit hiring system. Congress by statute or the President by executive order could make MSPB or VETS or perhaps even COVA responsible for veterans' preference appeals. Jurisdiction would have to be spelled out in bold letters to include every case in which a veteran appeals any personnel decision on the grounds of violation of veterans' preference. This jurisdiction must apply to individual and class actions and to the competitive and exempted services.

Making MSPB responsible would require serious change within that body which many would argue is needed in any event. On the other hand, VETS is an under-funded, under-prioritized agency with a growing list of tasks that have little to do with education and training. Veterans' preference cases could be another of these.

Thank you.

[The prepared statement of Mr. Crandell appears on p. 137.]

Mr. BUYER. Thank you very much.

Mr. Kahn, you're an attorney?

Mr. KAHN. No, I'm a paralegal, a paralegal with an attitude.

Mr. BUYER. So, you know what qui tam is?

Mr. KAHN. Not quite that much attitude.

Mr. BUYER. All right.

Gentlemen, I've got several comments I'd like to make and then I'm going to open it up for questions of you.

For the purpose of this hearing today, we're looking at two particular issues. You placed a lot of your emphasis upon the issue of the veterans' preference. We're also very concerned about USERRA, so, be prepared for both of them from my colleagues and myself.

The remark about veterans' preference being a "hollow promise", Mr. Naschinski, that's how you phrased it, the "hollow promise." That's what concerns not only myself, but also my colleagues. That's why they're sticking around here today. If Congress has said that there is an earned benefit, we are going to ensure and protect that benefit. The reality is, our discovery is, is that it has become a hollow promise. I would agree with that. And therein lies our responsibility—our responsibility in oversight, just as yours is in oversight in being helpful to us in educating us to the problems and concerns.

So, I would continue to compliment each of you in the veterans' service organizations for staying on top of it, and at the same time keeping the pressure on us, all of us. I think this has gone for far too long and it's now time to plug the hole. Let's not only work with us, but work with Chairman Mica. Make yourself known. Let's ensure that it's a benefit that's recognized.

On the issue of USERRA——

Mr. NASCHINSKI. May I interrupt you for just a moment, Mr. Chairman?

Mr. BUYER. Sure.

Mr. NASCHINSKI. I must say that it is really refreshing to finally have someone who is interested in rectifying some of these problems. For far too long, as you say, they have gone on. And hopefully, with your leadership and Congressman Mica's, we can resolve these problems.

Mr. BUYER. I believe it's a bipartisan issue. I've said over and over again, no one ever asks me when I wear the uniform if I'm a Republican or a Democrat. A veterans' preference is, in fact, blind with regard to political affiliation, race, sex, origin. It doesn't matter.

The USERRA—this one bothers me a lot right now. It bothers me because I spend so much time over there on the National Security Committee making decisions with regard to force structure. You know, do we have the sufficient force structure to satisfy a national security strategy of fighting and winning two nearly simultaneous major regional conflicts? And as we've downsized the force, the open secret is that we do not have that force structure today.

We have great reliance now upon the National Guard and the Reserve to meet that national security strategy. Reality is we don't have the force structure to meet it and we don't have the readiness capabilities within the National Guard for the enhanced brigades, or of enhanced systems out there. We only have platforms created for a lot of these advanced technologies that they talk about today. So, as we increase the pressure and reliance on the Reserves and the Guard, when they're called to duty and they perform that duty honorably, their jobs should be there for them.

The Reserves and the Guard for the longest time, that 2 weeks a year and one weekend a month, that's what it was. But as we have increased the operational tempo—as we've downsized the military, we have increased tremendous pressure upon the reserves. At the same time we're saying we want and demand a seamless military, and when it's seamless, the readiness capability of the Guard and Reserve must be there. So, we've added educational requirements. We have placed stressors within promotional requirements. And if they don't satisfy that time-line, they get RIFed because we're downsizing in the Guard and Reserve also, while we're increasing that pressure and the operational tempo. The stress is incredible.

Then the question is, how do we maintain and how do we retain those good quality airmen and the soldiers, the enlisted, the corps, the senior level leadership, not only in the enlisted ranks, but in the officer corps, while at the same time we're asking employers to carry a greater burden? So, in the defense bill that we moved out of the House, we added some extra benefits in there for the reservists. I think that's pretty important. We're asking them to do more. But I have no patience, none whatsoever, when I find that the Federal Government in and of itself, by the culture of bureaucracy that we're talking about today with anti-military bias begins to punish its own for service to country.

I enjoyed Professor Siegel and his remarks and we can get into the legal-ese, but I am one who will be dedicated to making sure that those who served, whether it's in the private sector, in particular the Federal Government does not punish its own when called to duty. When I think that this is the celebration of Memorial Day. When I read a passage about—I wish Sonny Montgomery were here—on European soil there was a battle and there was no one around to hear the last words of a mortally wounded soldier. He pulled from his pocket a pad and he wrote down his last words. When they were policing up the bodies from the battlefield, they found these words: "When you go home, tell them that I gave this day for their tomorrow."

Those are pretty profound last words from someone who's dying on a battlefield. That's why I have no patience, none whatsoever, when there are men and women who are permitting us to sleep in peace at night and enjoy the enrichment of living in a society that is free. We can exercise our liberties, justice and equalities and economic opportunities, and then our own, our own, punishes that service is disgusting.

Mr. Crandell, you outlined some obstacles to overcome in the process of redress of mechanisms for veterans' preference. If, as you point out, also that USERRA case load is a good model, how do you determine that 20 to 30 FTE would be needed at VETS to handle the responsibility for veterans' preference enforcement?

Mr. CRANDELL. You had asked us in a related letter that I don't have to answer until tomorrow——

Mr. BUYER. Okay.

Mr. CRANDELL (continuing). To come up with the figures. This was an attempt to come up with a ball park figure. I took the case load and the staffing for USERRA. I thought that might be analogous to handling veterans' preference cases.

Mr. BUYER. Okay.

Mr. CRANDELL. And then as we talked about 2 weeks ago about the number of letters we get, I came up with another figure there which I can't recall at the moment. So, I did some grade school math on that to create a staffing estimate.

Mr. BUYER. Okay. For you, Mr. Crandell, I'll be patient for 24 hours. I'll take a look at that.

Mr. CRANDELL. The other piece of it is, I think once we get through treating these cases seriously, initially, we'll have an impressive little case load. People who have given up will come back, once the word starts getting out that just like sex and race discrimination, you can not get away with violating veterans' preference as a personnel practice.

A lot of these cases are going to be resolved with phone calls. You'll have someone from this enforcing group, whoever it ends up being, making a call to the agency and saying "Are you crazy? This is the law and you're going to be in real trouble if you pursue this line." I think a lot of them will get resolved, as they do in other areas.

Mr. BUYER. Mr. Kahn, it's my understanding that you've been following the RIF action at the Army's arsenal in New York?

Mr. KAHN. Yes, I have.

Mr. BUYER. At Watervliet Arsenal?

Mr. KAHN. Yes.

Mr. BUYER. Would you describe what you discovered in the pattern employed? What has been used to circumvent veterans' preference?

Mr. KAHN. What it appears to have been is, we saw a bulletin that was sent out, I think on September 1993. The RIF happened on February 2, 1995, which gave them an open window as the bulletin said to do a number of personnel actions, which was transfer around, send people out on details, or move them, or you know, give promotions. What that basically does, it was setting people up who may have been vulnerable in that RIF for a much better starting position when the RIF hit.

It also seems to have happened—we talked to some people on Long Island who were with Defense procurement who had contacted us not too long ago and said the exact same pattern appeared to be existing prior to them announcing the reduction in force. They started promoting people, sending people out to training and putting people into positions that would not be touched in a reduction-in-force. Now, we do not know whether or not these agencies have had information 2 years beforehand in the Department of Defense that they would be being hit with a reduction-in-force, but everyone knows it has been a topic of discussion that the Department of Defense has been downsizing since before 1990.

So, we believe that this is happening in many different areas. I mean, if you go back to the GAO report that talks about Mare Island. They had a reduction-in-force there and then they turned around and hired, you know, women and minorities back when they found out there was a disproportionate impact.

You know, as we've talked before, we believe that there should be at least a 2-year freeze on any type of temporary promotions unless it's an emergency so it doesn't grant the benefit to anyone. It doesn't sit down and touch on the buddy system. That also happens a lot. You know, there's an old boy network and there's an old girl network. They take care of each other. They move people around.

Trying to get more information on that, you know, it gets very, very, very hard. We have filed discovery requests. In fact, we've even filed a discovery request with the GAO to get more information on the Mare Island report, and they have fought us in that subpoena. They do not want to release that information to anyone. But again, we think that is very germane and relevant to what's going on throughout the Department of Defense.

Mr. BUYER. I'd appreciate you watching that. If you'd keep us informed, I'd appreciate it.

I now yield to the Ranking Member for any questions he may have.

Mr. FILNER. Thank you.

Just briefly, I first want to take advantage of Mr. Crandell being here by just mentioning that the most moving Memorial Day ceremony I attended over the weekend in San Diego was the rededication of what was called the San Diego Vietnam Memorial. It's now called the San Diego Peace Memorial. It was the first memorial to Vietnam War fallen heroes, I think, in the United States. One of the founders of your organization, Mr. Bob Van Keuren, gave a moving and eloquent keynote speech on what it was to be a returning Vietnam veteran to our society. It educated and made a very meaningful Memorial Day for many, many San Diegans. So, we thank your organization.

Mr. CRANDELL. Thank you for that comment.

Mr. FILNER. We look forward to working with you.

And certainly this hearing has been very useful, Mr. Chairman.

Coming from San Diego, I just don't have that kind of sense that you so eloquently described in your remarks on the prejudice. San Diego apparently has a different sense of the military and veterans. The culture in San Diego is prejudiced the other way, if at all.

So, I'm learning about what the problems are elsewhere and I hope we can incorporate some of your suggestions into legislation.

Did any of your organizations see any problems with this *Seminole Tribe* decision for veterans? Have you analyzed that at all?

Mr. CRANDELL. Not as of yet.

Mr. DRACH. We haven't, sir. I just heard about it yesterday, as a matter of fact.

On that subject, we get in the DAV, relatively few complaints about reemployment rights. It has not been a major concern or problem within our organization. Why? I just don't know. We just don't get a lot of inquiries.

Mr. KAHN. I spent about 9 years working with New York State Department of Labor and we used to get many people. In fact, I was at DEVA. We used to get many people coming in, talking about this issue.

I think one of the real important issues that if you're going to address here, it's a matter of timeliness. One of the things that you may want to look is, you know, perhaps getting some sort of injunctive power to be able to put the person back to work while the issue is being decided. If someone is coming back from military service or being pushed out of the military, for them to come back out and not have any place to go to work to take care of their family—we called them from their civilian occupation and unless you have the power to put him back to work while the issue is taken care of, you're going to just watch that person kind of fall around into the background. Many veterans usually come in and say, "oh, no. We're going to go in and file this and people are just going to walk away from it."

There has to be something that makes someone do something. People pay attention only to those things they have to. Unless there's a way of making employers act immediately, it is not going to work. It has to work immediately.

Mr. FILNER. I appreciate that. I mentioned earlier to Mr. Mica several other suggestions about making both employment, small business loans, federal contracting abilities better able to serve veterans. If you have any comments on that legislation, either now or at a point in the future, I'd like to work with you on that.

Thank you very much for being here.

Mr. BUYER. Thank you.

Mr. Mascara, you're now recognized for 5 minutes.

Mr. MASCARA. Thank you, Mr. Chairman.

It's disgusting, some of the testimony we're citing that Federal employees have engaged in personnel subterfuge to avoid veterans' preference hiring. It's unbelievable.

Mr. Drach, you mentioned in your testimony—I received the testimony late last night, took it home to my apartment and had an opportunity to peruse it. But you mentioned in your testimony that disabled veteran Federal employees complained that their employer will not recognize affirmative action. In Mr. Naschinski's testimony, he states that the problem is that veteran preference is an earned entitlement and not an affirmative action program. Would you or Mr. Naschinski please differentiate between those two and how that affects hiring?

Mr. DRACH. Yes, sir. Title 5 U.S. Code deals with veterans' preference. That's the modification of the Veterans Preference Act as amended. In Section 4214 of title 38 U.S. Code, there's an affirmative action requirement that's been in existence since roughly 1973 and then amended in 1975, which requires in essence that Federal departments and agencies take affirmative action to employ and advance in employment qualified disabled veterans.

So, while veterans' preference is a free-standing statute in title 5, the affirmative action requirements are a free-standing provision of title 38. The difference being is that the veterans' preference has a tangible component, if you will, five or ten point preference which adds on and then you get on the register and so forth. Affirmative action is very nebulous. And that's one of the issues I mentioned earlier with the Federal Labor Relations Authority, what does affirmative action really mean? If you have two equally qualified applicants for a promotion, for example, one being a non-veteran and one being a veteran, does the veteran get some extra edge? But now you have competing interest because women are entitled to affirmative action. Minorities are entitled to affirmative action. So, with the standard, we have three equally qualified people, a Hispanic, a female, and a veteran. Who gets the promotion? And that's one of the areas that I think are ripe for abuse.

In current Federal statute, under the Federal Equal Opportunity Recruitment Program, FEORP, which is in title 5, federal managers are held accountable for their success in promoting women and minorities, but not held accountable for their success or lack thereof for promoting veterans.

Mr. MASCARA. Thank you.

Mr. Naschinski, on page three of your testimony, the third paragraph, you state that during the reorganization of the U.S. Postal Service in 1992, a reduction-in-force took place. But somehow, the Federal Government did not call it a RIF, therefore avoiding RIF rights under veterans' preference. Was the absence of the use of the terminology RIF in this case intentional to avoid veterans' preference hiring?

Mr. NASCHINSKI. Absolutely.

Mr. MASCARA. Horrible. I cannot believe that our own Government would do that.

You went on to say that the provisions under the original legislation is meaningless. Would you want to expand on that? In other words, that terminology is complete disgust on your part too?

Mr. NASCHINSKI. Well, what we meant, Congressman, was that when you have federal managers who are as adept as they are becoming at circumventing the law and the intent of Congress, it's meaningless.

Mr. MASCARA. Good. Thank you, Mr. Naschinski.

Thank you, Mr. Chairman.

Mr. BUYER. Thank you.

Mr. Cooley, you're recognized for 5 minutes.

Mr. COOLEY. Thank you.

Mr. Naschinski, you know, I've read the article in the American Legion magazine concerning Executive branch avoidance of the veterans' preference requirements and additionally, we've received some calls in our area on this. You testified, and other members of the panel, that Congress should enact of method of redress for veterans who were discriminated against because of their veterans status.

Do you think that the Congress should maybe use the word "veteran" in a list of individuals protected by title 7, the anti-discrimination statute? And that title 7 would apply to the private sector and that it would not require preference, per se? Has the Legion ever discussed this, the possibility of trying to do something to remedy some of this?

Mr. NASCHINSKI. To the best of my knowledge, we have not. I really don't feel comfortable in responding to your question at this time because I'm not familiar with title 7. However, I'll be happy to submit for the record, a written statement.

Mr. COOLEY. I think that's something you should maybe take a look at to see if that would not be some quick method of redress there. But you ought to take a look at that. I think it's something that should be at least looked at.

Mr. CRANDELL. Mr. Cooley, if I could comment on that?

Mr. COOLEY. Of course.

Mr. CRANDELL. I think we're dealing with two things, one of which we've resisted. I think that the idea of prejudice against hiring veterans is something that we have all resisted believing for some time. We're finally getting to the point of recognizing it's there.

We have under title 7, protections against discrimination for various categories of people who have experienced it historically. What you have that's different in affirmative action programs and in veterans' preference, that I think works beyond saying you can not discriminate, is, you really have to hire more of these people than you've hired before. So that, we've had cases where it's really important to get agencies beyond saying, "Well, we haven't discriminated against veterans. We just haven't given them preferential hiring that the law demands." They have to take that extra step.

Mr. KAHN. You know, there is a section under 42 U.S.C. 2011 which is the Equal Employment Opportunity statute which provides that nothing within this section shall in any way repeal or modify any Federal, State or local law granting preferences to veterans.

What has happened is, during the RIFs, everyone is giving consideration to women and minorities when those are not supposed to be a factor under 42 U.S.C. 2011 and under title 5, United States Code 3501 through 3504, which is the RIF laws. There is also a section that—I think it's 2000 E2, which basically says that seniority or merit system are not discriminatory if they were a bona fide seniority or merit system. And again, people are finding ways to knock out someone who has the seniority or has been rated highly qualified, to just knock them out of the picture so they can meet other goals.

I mean, part of the issue is, I believe, that people need to see that there is a difference between veterans' preference and affirmative action programs. There are numbers of different types of special hiring authorities that have been used over the years instead of using a register. It is the advent of many of these special hiring authorities that have directly undermined veterans' preference. If people have to use a register, then you will see the numbers of veteran hires and strict veterans' preference rules enforced, you will see the number of veterans begin to rise again.

A VRA appointment, which is a special hire, a 38 U.S.C 4214 is a two year appointment. Many agencies have abused those types of appointments. I mean, hiring someone to be a custodian under VRA is a farce because that's already restricted to only preference-eligibles under 5 U.S.C. 3310. So, someone needs to sit down and make people in personnel start reading the law and maybe have a Merits System Protection Board in the courts to start reading the black letter law in not reaching judicial pronouncements.

Mr. DRACH. Mr. Cooley, just one further comment on what Mr. Kahn just said. That section, U.S. Code 42 flows from either Section 712 or 713 of title 7.

Mr. COOLEY. Mr. Kahn, this brings up another thing. What is a designer RIF?

Mr. KAHN. A designer RIF means that when people start moving someone around 6 months prior to a reduction-in-force, they are manipulating the law to get to the income that they want through an agency. There is a program called a RIF Wiz that people can, you know, turn around and put what they want and basically, manipulate how they want their agency to look. It's a computer program. There are more and more of these things being done.

What the RIF rules require is that a retention register is set up. The Postal Service during their "restructuring" never set up a retention register, never set up who was competing against anybody. They moved people out into a replacement center and kept them at the same grade even though they had no job. And OPM basically stepped in and joined the post office in their appeal to the Merit System Protection Board. You know, the Office of Personnel Management changed the regulations back in 1983, even though the law wasn't changed. They decided that they wanted to interpret it this way.

Part of what Congress has to do in all of these laws is make sure that there is no wiggle room. As long as they have wiggle room, there are people who are very, very creative in the federal sector. I mean, there is a culture that has started since the 1970s and that has grown within the agencies, the careerist. They have an agenda.

There are many people who don't like people who served in the military. So, there is that culture. I mean, I know I work for the Department of Labor. I know the culture. They send me out for a month of training. As soon as I came back into the agency, my agency said, "forget everything you learned in training. Here's how we do it." So, that's how the culture begins.

What Congress has to do is nail it down and don't give anyone the wiggle room to reinterpret the law. I think Congress should also look at many of the court holdings that have interpreted veterans' preference. I think they would find them very instructive.

Thank you.

Mr. COOLEY. My time has run out, Mr. Chairman.

I want to thank you very much, Mr. Kahn. I think you have hit on a point that many of us observed even though we've been here a very limited time. That there is another culture there that was in these buildings and the surrounding ones.

Mr. BUYER. I'd like to read into the record here, Secretary Robert Reich for the Department of Labor, recently submitted his first report to the Congress, addressed to the Speaker of the House, dated May 2, 1996.

I'll place this entire document into the record for today's hearing.

In particular I note, though, the paragraph by the Secretary with regard to trends. He noted that—this must be with the prosecution of these type of cases—the number of cases opened on behalf of reserve components personnel continues to increase as a percentage of the total number of cases opened. In fiscal year 1992, 59 percent of cases were opened on behalf of reserve component personnel. This percentage increased to 69 percent in 1993, increased to 75 percent in 1994, and increased again to 77 percent in 1995. This steady increase may be attributed to the growing use of the reserve components to provide for national security and the decreasing number of personnel in the active components."

That was directly from the Secretary of Labor. I'll place this into the record.

(See p. 63.)

Mr. BUYER. Gentlemen, thank you for your time and I appreciate your services.

Mr. DRACH. Thank you.

Mr. NASCHINSKI. Thank you.

Mr. KAHN. Thank you, Mr. Chairman.

Mr. CRANDELL. Thank you.

Mr. BUYER. Our final panel represents several agencies. Today, we have the Honorable Preston Taylor, the Assistant Secretary for Veterans' Employment and Training; the Honorable James King, Director of the Office of Personnel Management; accompanied by Mr. Klein, the Associate Director for Employment Service; and Ms. Dollarhide, the Director for Education Services at the VA. We had invited the representative from the Attorney General's Office to testify on the *Seminole* case, but unfortunately, they could not appear. We look forward to receiving the Department of Justice's written statement.

Before we begin, I'd like to ask the subcommittee's indulgence to show a 3-minute videotape, a news piece shown on Channel 7 just a few days ago. The tape illustrates a problem some of the reservists faces within the federal bureaucracy.

I would also like to note that for the last several years, I have done my share of bashing of news media. Talk about trend lines—I'm very concerned with a lot of the journalists that like to go for the splash, the glitter, the headlines, do headhunting, character assassinations, you name it. Very seldom do you get an opportunity to sit at home and see a piece of news that has text, has content, has substance and is credible and operates as a mechanism of accountability. I pay great tribute to and credit and compliment to Ms. Kim Skeen for her work that she did in putting together this piece.

Would you please? I'd like for the panel to see this.

[Video.]

Mr. BUYER. Before the government witnesses begin, I'd like to announce that I'm going to sponsor legislation to make failure to comply with veterans' preference a prohibited personnel practice at the Department of Veterans Affairs and protect veterans during RIFs at the FAA. I can not go as far as what the American Legion had recommended to permit an actual Federal civilian employee would actually sue a particular manager. I'm not going to go that far. These bills are about ready to be dropped, and I'd invite all members to join me in sponsoring the bills.

Mr. BUYER. Secretary Taylor, let's begin with you. You are recognized and I appreciate you being here and you're recognized for 5 minutes.

STATEMENTS OF HON. PRESTON M. TAYLOR, JR., ASSISTANT SECRETARY OF LABOR, VETERANS EMPLOYMENT AND TRAINING; HON. JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT ACCOMPANIED BY MR. LEONARD KLEIN, ASSOCIATE DIRECTOR FOR EMPLOYMENT SERVICE; MS. CELIA DOLLARHIDE, DIRECTOR OF EDUCATION SERVICES, DEPARTMENT OF VETERANS AFFAIRS

STATEMENT OF HON. PRESTON M. TAYLOR, JR.

Mr. TAYLOR. Good afternoon, Mr. Chairman and members of the committee.

Thank you for the invitation to testify on the Uniformed Services Employment Reemployment Rights Act, known as USERRA. I request that my entire written statement be entered into the record.

Mr. BUYER. It shall be entered. Thank you.

Mr. TAYLOR. At your hearing last June, I reported on VETS' implementation of USERRA during the months following its October 1994 enactment. This afternoon, I'll highlight observations from the first annual report as submitted to Congress earlier this month. Additionally, I'll note several pending legislative issues with program impact. And finally, I'll discuss VETS' plans for improving program administration.

In the first year under USERRA, VETS opened 1,387 new cases, a 15 percent increase over the number of cases opened in fiscal 1994. About one-third of the increase can be attributed to cases opened on behalf of Federal Government employees. The remainder of the increase may well have come from the extensive publicity that followed the enactment of a new law.

Seventy-eight percent of the cases opened in fiscal year 1995 involved private employers, 17 percent involved States or the political subdivisions of States, and 5 percent involved Federal agencies.

VETS closed over 1,200 USERRA cases in fiscal year 1995. Ninety-five percent of the claims were resolved without need for referral to the Attorney General or the Special Counsel. Nearly $1 million in lost wages and benefits were recovered for claimants.

On August 2, 1995, I testified before your subcommittee on behalf of the Department in support of certain proposed technical and clarifying amendments to chapter 43 of title 38, United States Code. Those proposed amendments were later incorporated into H.R. 2289, a bill approved by the House of Representatives in December, 1995. I supported those same provisions again last week in testimony before the Senate Veterans' Affairs Committee and hope they are passed in the 104th Congress. They are needed to provide for the effective implementation of USERRA.

Needed also are changes to the Internal Revenue Code to reconcile Code provisions with USERRA requirements regarding employee pension benefit plans. Employees and employers must be allowed to make up contributions to their pension and profit sharing plans for the period the returning service member was on active duty.

Efficient administration of the Reemployment Rights Program remains a commitment of VETS as it continues to reduce its workforce. To improve its efficiency, VETS recently established a USERRA Regional Lead Center in Atlanta. The USERRA Regional Lead Center will provide support and assistance to VETS case investigators, collect data from field offices, analyze the data, and deliver information to the National Office.

To assist in these activities, the Regional Lead Center will call upon a cluster of 15 experienced USERRA staff throughout the country coming from VETS, the Office of the Solicitor, and the National Committee for Employer Support of the Guard and the Reserve.

VETS also is developing a new management information system for USERRA cases that will be accessible by all VETS staff through the Internet, providing real time knowledge for both individual cases and the entire program.

Mr. Chairman, I am proud that VETS has met successfully each of the many challenges it has been presented in the implementation and administration of a new comprehensive law. Innovations such as the Regional Lead Center should enable VETS to continue adjusting to the ever-changing demands of this program.

Mr. Chairman, that ends my formal testimony. I'd be glad to respond to any questions you might have.

[The prepared statement of Mr. Taylor appears on p. 144.]

Mr. BUYER. Mr. King.

STATEMENT OF HON. JAMES B. KING

Mr. KING. Thank you, Mr. Chairman.

Members of the subcommittee, may I introduce on my right side, Mr. Leonard Klein, Associate Director of OPM's Employment Service. I thank you for the opportunity to testify on the Clinton administration's strong record of support for the Veterans Preference Act.

I believe wholeheartedly, as does President Clinton, that veterans preference is an earned right and must be treated as such. The Administration has a 3-year record on veterans' preference that we are proud to put before you and the American people.

Let me first say that the number of veterans in the Federal workforce has been declining for a number of years and there are two reasons for this. The first is the aging of our veterans' population. In the past 6 years, veterans have accounted for more than half of all the retirements in the Federal civil service.

The second reason is the demographics of the veterans' population. In fiscal year 1995 of the Federal employees aged 55 to 64, 43 percent were veterans versus 28 percent in the civilian labor force. Of those aged 45 to 54, 39.5 percent were veterans as opposed to 21.9 percent in the civilian labor force. But among those aged 35 to 44, 20.9 percent were veterans, and those of aged 20 to 34, a 15-year span, Mr. Chairman, that figure drops to 6.9 percent veterans in our workforce. That's compared to the civilian workforce of 4.7. So, as you can see, Mr. Chairman, there's a very dramatic decline among younger people in relation to the actual veterans' pool.

As the number of veterans declines, one measure of success of veterans' preference would be, what is the percentage of new Federal civilian jobs—where are they going and who's getting them? They are going to veterans and that has risen dramatically in the past 3 years.

Mr. BUYER. What kind of jobs?

Mr. KING. Pardon?

Mr. BUYER. In what kind of jobs?

Mr. KING. They are full-time employment with our Federal Government, and I can get the breakdown for the record, Mr. Chairman, if you would like.

The average of 18.5 percent of women and men hired for new full-time, permanent positions in fiscal years 1990, 1991, and 1992 were veterans and it was a good record. For fiscal years 1993, 1994, and 1995, that figure rose to 31.1 percent, an increase of more than 50 percent in 3 years. I think that is also an excellent record, Mr. Chairman.

Let me give you another example. The vast majority of veterans are men as you well know. In 1995, 47.7 percent of the 24,846 men aged 20 or older who were hired for full-time permanent Federal jobs were veterans. 47.7 percent were veterans. That is more than double the 22.4 percent of the men over 20 years of age in the national workforce who are, in fact, veterans.

I should add that 10.8 percent of the 19,819 women, aged 20 or over, who were hired for full-time, permanent Federal jobs in 1995 were veterans. That is nearly eight times the percentage of female veterans, women veterans, which is 1.4 percent in the national workforce.

So, it is not rhetoric, Mr. Chairman. These numbers reflect real men, real women, real families. About 14,000 women last year were joining our civil service largely because of their own skills and talents. But also, in large part, because of veterans' preference. At a time of intense competition for Federal jobs, Mr. Chairman, about 8.5 people, on average, we receive as applicants for a single vacancy in the Federal Government. These figures demonstrate that eligible veterans are being well served by veterans' preference.

Mr. Chairman, in your letter of May 19, you did ask two questions. First, the subcommittee's interest in redress mechanisms for those veterans wishing to pursue their rights. It is unfortunate, but it seems inevitable, that when tens of thousands of job applications are processed every year by OPM and scores of agencies, mistakes will be made. When we hear allegations, we investigate and take appropriate action.

Further, acting under existing law, the Office of Personnel Management has entered into a memorandum of understanding with the Labor Department regarding the handling of complaints of veterans' preference violations in hiring. The Department is responsible in the first instance for reviewing those complaints. If Labor doesn't resolve the case, it is referred to OPM for investigation and final action. The Labor Department has some 3,000 local veterans' employment representatives available at the State Employment Service offices to resolve the vast majority of these issues that arise.

I believe there is a need for better communication of veterans' rights. We find many veterans do not understand what rights they do have. That is why the Labor Department's local representatives are able to resolve so many of the inquiries simply by explaining the law. Five cases reached OPM last year and one of those was found to involve a valid issue of veterans' preference, and that one was resolved, Mr. Chairman.

The Office of Special Counsel, OSC, also plays a role, as you know, in this process. Under the law, OSC has the authority in certain cases to represent a federally employed veteran or reservist before the Merit Systems Protection Board and, potentially, the U.S. Court of Appeals if an agency fails to reemploy that person in accordance with the law. These three cases are referred to OSC from the Department of Labor. OSC has received one such case during fiscal year 1995 and is presently investigating it.

Mr. Chairman, we believe the existing system is fairly and efficiently enforcing veterans' preference. However, we are very much aware that some veterans and veterans' organizations believe that a new or formal appeals process would improve the system. Should Congress decide that such a mechanism is needed, we would work with you to achieve it, as we would support any action that would serve the rights of veterans and their interest, Mr. Chairman.

I can stop here rather than go forward to the second question. What would you prefer, Mr. Chairman?

Mr. BUYER. Go ahead.

Mr. KING. Thank you, Mr. Chairman. I won't go on too much longer, sir.

Our Office of Merit Systems Oversight and Effectiveness is part of our regular Government-wide review process. It evaluates whether agencies are fully enforcing veterans' preference. When violations are found, we direct the agency to take corrective actions. These can include removing an employee from a position in favor of a veteran who has been wrongly denied preference.

In addition, OPM's Employment Service reviews the medical record when disabled veterans are denied employment on medical grounds. On average, we overturn 40 percent of the decisions adverse to the disabled veterans, enabling them to enter jobs for which they in reality qualified, Mr. Chairman.

Your letter also noted your interest in use by agencies of single-person competitive levels and alternative personnel systems. Each agency has responsibility for carrying out reductions-in-force, RIFs, in accordance with the law and OPM regulations. By law and regulation, veterans are entitled to preference over other employees during RIFs. This protection has not been significantly changed in more than 50 years. As a part of the RIF process, each agency must determine appropriate competitive levels. This determination is based solely on each employee's current position description, not on personal qualifications.

It is true that a competitive level could consist of a single employee, particularly in the case of workers with highly specialized skills. But in all areas, and in all cases, OPM regulations require agencies to establish competitive levels solely on the basis of the duties of the position in question. Moreover, qualified veterans have the right to bump non-veterans in other positions in the agency where the RIF is taking place. In all of these ways, veterans' preference continues to provide strong protections for qualified veterans during RIFs.

Let me give you an example, Mr. Chairman. The total workforce for U.S. Geological Survey was 2,192 people prior to last year's RIF. Of this total, 292 employees qualified for veterans' preference protection—of them, nine, or 3.1 percent, were separated. This compares with 268 non-veterans who were separated, who represented 14.1 percent of the total non-veteran workforce. If you will, Mr. Chairman, veterans were four times less likely to be separated in this particular case.

You asked about alternative personnel systems. For the past 5 years, the Department of Agriculture has operated a demonstration program project that has tested an alternative to the rule of three in hiring. In this program, applicants are designated either quality or eligible, based on their qualifications. Qualified disabled veterans are automatically placed in the quality group. All candidates in the quality group are available for selection with absolute preference given to veterans.

This project was carried out in units of the Forest Service and the Agricultural Research Service, and it involved about 5,000 new hires, Mr. Chairman. It has been called a success by both managers and veterans. Managers say it gives them more flexibility and better selection. Veterans' organizations have found that a higher percentage of veterans are being hired. We believe this program could appropriately be used elsewhere in the Government.

We are demonstrating our support of veterans' preference in many other ways. The Administration has proposed civil service reforms that will reflect our full support of veterans' preference, as do guidelines that OPM has issued recently on the new performance based organizations, or the PBOs.

Mr. Chairman, we will work with you in any way we can under the law, to carry out our solemn obligations to the veterans of America. I thank you, and I welcome any questions you may have or the committee may have, Mr. Chairman.

[The prepared statement of Mr. King appears on p. 153.]

Mr. BUYER. Thank you, Mr. King.

I know both of you have brought others with you.

Do you have any comments you'd like to make, Mr. Klein or Ms. Dollarhide? No?

All right, unless they turn to you.

I have a ton of questions. What I'm going to do is, I'm going to reserve them and I'm going to turn to the Ranking Member for any questions he may have at this time.

Thank you.

Mr. Cooley, you're recognized for 5 minutes.

Mr. COOLEY. Go ahead.

Mr. BUYER. All right. Thank you.

Were both of you here and heard the testimony of the other panels beginning with Chairman Mica?

Mr. KING. No, I read Mr. Mica's statement, but I wasn't physically present.

Mr. BUYER. All right. Thank you.

Mr. TAYLOR. I was here.

Mr. BUYER. All right. Thank you.

Secretary Taylor, would you care to comment on your feelings or senses about Mr. Mica's proposal for redress of veterans' preference violations?

Mr. TAYLOR. I understand that this has really been an issue that has been debated and discussed recently. There have been several hearings. I know that you, yourself, Mr. Chairman, testified before Mr. Mica's subcommittee. I would like to reserve comment on that until after I've had a chance to look at the draft legislation.

Mr. BUYER. That's fair enough.

In your May 7 testimony to the House Appropriations Subcommittee of Labor, Health, Human Services, Education and related agencies, you testified that the Administration did not request funding for the National Veterans Training Institute, NVTI, and will seek "alternative forms of training."

What will those forms be?

Mr. TAYLOR. Well, as I testified then and I'll testify again now, we are working on ways in which we can provide the type of training that may be required.

First of all, let me just say that the Administration basically, because of the budget constraints, made a decision to eliminate NVTI, but at the same time, the President has given us more money for the DVOP and LVER programs which will result in about 6,000 to 7,000 more jobs for veterans.

Mr. BUYER. But they're trained at NVTI, correct?

Mr. TAYLOR. The DVOPs and LVERs are trained at NVTI, but over the years, we have worked very closely with the States in developing curriculums that the States themselves have used to train their own DVOPs and LVERss. For example, case management.

I was recently in California, in the Los Angeles area, to witness some veterans focus groups on employment issues. I was told that they couldn't wait for NVTI to schedule their people for case management. They had to do it themselves out there. And so, what we did was, we cooperated with them and provided them with the information and the State of California put the case management course together.

Mr. BUYER. Your investigators in USERRA, are they trained at NVTI?

Mr. TAYLOR. No, sir. We don't have an investigators' course yet. We are developing one now. The Regional Lead Center that I referenced in my testimony is a new concept that we're going to implement. We have consulted with the veterans' service organizations. We've consulted with the members of your staff and the staff of the Senate before we decided to implement this. We explained the concept to them. Everyone thought it was a good idea, and now we're moving forward to do that.

One of the Regional Lead Centers will be a USERRA Regional Lead Center, and that will be located in Atlanta. Basically, there will be a group of USERRA specialists, to include representatives from the Solicitor's Office who are well versed in USERRA. They will act as our subject matter expert group.

Now, I asked the question yesterday to members of my senior staff, can the USERRA cluster, Regional Lead Center in Atlanta, be used also to train our investigators once we have the investigative course developed? I was told, you know, that's quite possible and we'll look into that.

Now, I think there's something that needs to be clarified on the old VRR and now the USERRA law, is that DVOPs and LVERs are not authorized to investigate USERRA or VRR cases. Only Federal staff can do that.

Mr. BUYER. All right. We saw a tape here and I'm not here to seek one particular case. They're all very important cases.

There was a lady who is a Naval officer and there's allegations of a prejudice against her. Would you describe to me what the VETS work in that particular case, involved with the Department of Agriculture in Maryland?

Mr. TAYLOR. Mr. Chairman, because of the Privacy Act and also in order to protect the individuals, I would be very happy to talk with you about specific cases in an executive session.

Mr. BUYER. Well, I tell you what. She's standing in the back room. She could waive her rights to privacy if she so chooses.

Pardon? Would you please come forward to a microphone?

Mr. Klein, would you mind if she—okay, here we go.

Would you please state your name and who you are?

Ms. LEPERI. Yes, Chairman. My name is Karin Leperi, Lieutenant Commander USNR. I respectfully waive my rights to privacy.

Mr. BUYER. And permit any comment from the Department of Labor with regard to your case with the Department of Agriculture?

Ms. LEPERI. Most certainly.

Mr. BUYER. All right.

I tell you what. I'll allow you to think for a moment. We're going to excuse ourselves to go vote and we'll be right back.

This committee stands in recess for a vote.

[Recess.]

Mr. BUYER. I bring this subcommittee back to order.

Before we begin our line of questioning, I want Ms. Dollarhide to testify and place in the record her testimony.

You may begin.

STATEMENT OF MS. CELIA DOLLARHIDE

Ms. DOLLARHIDE. Thank you, Mr. Chairman.

If I could just turn to another topic very briefly. I want to thank you for the opportunity to appear before the subcommittee to provide testimony on the discussion draft concerning VA educational assistance programs. We especially appreciate the subcommittee's efforts on this bill since these proposals further streamline and simplify our education programs. And more importantly, these provisions will improve the education programs for our customers training under them.

The bill does the following: Eliminates the distinction between open circuit television and independent study courses; modifies the medical certification requirements for flight training; authorizes educational benefits for courses necessary to maintain or restore professional or vocational certification or proficiency; and awards benefits based on full resident training rates for cooperative training; allows pursuit at one-half time or more; and amends the minimum education requirement for entitlement to Montgomery GI bill benefits.

We fully support these proposals and believe the amendments to our education programs to be both equitable and necessary. The complete testimony provides our analysis of each section and I would like to ask that it be added to the record?

Mr. BUYER. It shall be entered in the record. Thank you.

Ms. DOLLARHIDE. I would also like to comment briefly on veterans' preference.

The VA is proud of its position as a leader among large Federal agencies in the employment of veterans. As of the end of March, 64,614 individuals, or slightly more than 25 percent of VA's workforce, were eligible for veterans' preference. We are equally proud of the almost 13,000 employees on our roles who served in the military but who are not accorded veterans' preference due to eligibility requirements. Veterans comprise more than 30 percent of VA's workforce. In support of enhancing opportunities for veterans in the VA, in 1993, Secretary Brown established a Veterans' Employment Program within the Department.

This concludes my oral testimony, Mr. Chairman, and I'd be pleased to answer any questions you might have.

[The prepared statement of Ms. Dollarhide appears on p. 158.]

Mr. BUYER. All right. It's time that we be excused. We've got to vote.

We're going to stand in recess.

[Recess.]

Mr. BUYER. I call the committee back to order.

To the Ranking Member, I was not as watchful as you. We've had that second vote. I came over here. We had missed Ms. Dollarhide before we moved into questioning and permitted her to testify. We got her testimony in. Then we recessed and now we're back.

Mr. FILNER. Mr. Chairman, are you intent on moving forward with the request that you had made before the earlier recess?

Mr. BUYER. With my request?

Mr. FILNER. Or with the line of questioning with regard to the personnel matter?

Mr. BUYER. Am I going to ask Mr. Taylor questions about the case that we saw on television?

Mr. FILNER. Yes.

Mr. BUYER. Yes, I am.

Mr. FILNER. I would like to register for the record a protest to this line of inquiry. First, on practical grounds. That is, neither the committee, nor the Secretary, nor anyone else had any advance warning that this would be done to allow us to prepare for this.

You made a very eloquent statement before the showing of the tape which, if I had the power—and apparently we don't—to read it back to you about the press going for headlines and grand-standing. I would like to make reference to those remarks in regard to what you apparently are going to do now. This is an individual case. It's not appropriate, certainly, without putting it into some context or allowing us to know what's going on, to deal with this matter in this oversight hearing.

In addition, I am not convinced, although I am not an attorney, that someone coming up to the front of a chamber and saying "I waive my rights" is, in fact, a legal waiver of those rights. It wasn't in writing. If she decides later that this has violated her rights and said, "I was coerced or something by the situation or the chair, or whatever, to do that" I suspect that she has not legally waived her rights.

There's a myriad of questions. I'm not sure—I've talked to the staff—this has ever been done before. This is a personnel matter within a context of a specific situation. I don't think it's in the purview of this committee to be exploring it in the way that you're doing it. Certainly, we have the right to learn from individual cases that occur to help us legislate. But to bring it up in this fashion, I would prefer that you not do it and that we take it up in a different context.

Mr. **BUYER**. To the Ranking Member, your protest is noted. I am not moving into the actual case. I couldn't even tell you the specific facts of the case itself. The purpose of the oversight hearing is to look at the overall systems. It's not to try any individual's particular case and I think that your concerns are noted.

Mr. **FILNER**. But when you bring up the individual, spring it on us. She's coached on what to say, apparently. You are going to discuss a specific case which none of us are familiar with or where it fits into anything.

Mr. **BUYER**. If you have any knowledge with regard to whether she's been coached or not—I mean, she's not here to testify, nor is the other side. You've almost left me with the peculiar feeling as to who's trying to protect whom from what.

Mr. **FILNER**. Counsel, has she waived her legal rights under the Privacy Act?

Mr. **BUYER**. The questions I'm about to move into and ask about are systems, systems questions.

Mr. **FILNER**. Can I get an answer to my question?

Mr. **BUYER**. What counsel has advised me is that the lady who came up and on record said that she waived her rights to privacy is also represented by counsel. Is her attorney present here today? Obviously, if she's represented by counsel, it would be wonderful if her attorney would know if she waives her right to counsel, what impact, positive or negative, that would have on her individual case. I'm sure it would be beneficial to her. I'm sure she wouldn't be aware of all of those instances. I obviously did not know she was represented by counsel, either, when I asked her to come forward.

In that context, I am going to pursue this further, but I am going to ask very limited questions, okay?

Mr. **FILNER**. Thank you, Mr. Chairman.

We're talking about policies and procedures and that's perfectly appropriate.

Mr. **BUYER**. Sure.

Mr. **FILNER**. I applaud you for doing it.

Mr. **BUYER**. Thank you.

The questions I have and, Mr. Taylor, I'm not here to hit you with a broadside either. It was brought to my attention that an individual, having been an employee in the U.S. Navy, had gone on a leave, involuntarily, and then placed on AWOL status from that Department and was not treated, perhaps, the way she should have been.

Let me ask you this. On TV, it said that the case has been resolved. Has, in fact, this case been resolved?

Mr. TAYLOR. I don't think that that was stated on TV, sir.

Mr. BUYER. Well then maybe I missed it.

Do you know whether or not this case has been resolved?

Mr. TAYLOR. I think the case is still being processed.

Mr. BUYER. It is still being processed.

One of the VSOs gave a recommendation that when someone is being mistreated, that they should not be placed out on administrative leave. That they should have their job during the action. Do you agree with that or not?

Mr. TAYLOR. I would have to defer to my lawyer that I brought along with me. She has helped us in writing up the USERRA manual that we used at the National Veterans Training Institute to initially train those members of my Federal staff who normally investigate veterans' reemployment rights claims, the predecessor to USERRA. She has been extremely helpful to my office and to me. I would consider her an expert on USERRA. I have brought her with me——

Mr. BUYER. Go ahead.

Mr. TAYLOR (continuing). Ms. Susan Webman.

Mr. BUYER. Thank you, ma'am.

Ms. WEBMAN. Could you repeat your question, please? I'm sorry.

Mr. BUYER. The question is, one of the veterans' service organizations gave a recommendation that when someone went on their military service and they came back and for some reason, they were classified as AWOL for example. They [the employer] said, "no, you don't have a job. You walked off the job. We told you you couldn't go, but you went anyway", and then they [the veteran] file their complaint. When there's a prima facie evidence or probable cause in that complaint, should we follow the advice of the VSOs and say, "we should place them back in their job", or do we put them out on administrative leave?

Ms. WEBMAN. If you're asking me for my personal opinion, if the case is as blatantly clear as you've just described it, I would say there would be good cause for putting the person back in but that's not what the law requires. There's a consideration for the employer point of view in the statute itself.

Mr. BUYER. Right. And what the recommendation is, instead of saying, "we're just going to put them out on administrative leave" is that once on that probable cause, we place them back in the employment status.

Ms. WEBMAN. My personal opinion would be that would be an appropriate way to deal with the situation.

Mr. BUYER. Appropriate?

Ms. WEBMAN. Yes, yes.

Mr. BUYER. Okay. Okay.

Ms. WEBMAN. An appropriate way to deal with the situation when the facts are so crystal clear that the person was being denied reemployment based on the service in the military.

Mr. BUYER. Mr. Taylor, are you aware that in the particular case of Ms. Leperi whether or not it took White House intervention from a policy liaison to move her status in her case from AWOL to administrative leave?

Mr. TAYLOR. I'm not familiar with the specific case. As I told you earlier, we had 1,387 cases last year.

Mr. BUYER. All right. I asked that question because it concerned me a lot. I mean——

Mr. TAYLOR. Well, I would be willing——

Mr. BUYER (continuing). The White House has a lot of things to do.

Mr. TAYLOR. Well, I would be willing to, as I stated earlier—in this particular case, I can send you over—I'll go back and check on that particular aspect of the case. There's not a problem with me sending that information over to you so it's not an executive session request. I'll be very happy to provide you with that information later.

Mr. BUYER. Hopefully, it wouldn't take intervention from the White House to move cases along and that type of thing.

Mr. TAYLOR. Hopefully.

Mr. BUYER. Let me ask you—pardon?

Mr. TAYLOR. I agree.

Mr. BUYER. Let me ask you this. Are you aware of any cases right now ongoing, or investigating cases within the Department of Labor?

Mr. TAYLOR. There is one, yes. There was, as I said, out of the 1,387, there were 128 Federal cases; 105 of which were resolved, leaving several still unresolved. One of those is in the Labor Department.

Mr. BUYER. All right.

Let me yield right now to the Ranking Member for any questions that he may have.

Mr. FILNER. I just have one question with regard to policy. You heard earlier that I introduced legislation with regard to the Supreme Court decision. I hope the Administration will look at it and take a position on it, and let us know what you think about it at some point.

Mr. TAYLOR. Yes, sir.

In dealing with VRR and now USERRA, in addition to my agency having the responsibility to find jobs for veterans and to train those who are shortly going to be veterans, we are an enforcement agency. That is USERRA. So, as such, I rely very heavily on the Solicitor's Office for help and guidance in regard to interpreting the law and promulgating the law.

In the case of *Seminole*, I have asked Susan and Don Carter, who is also one of our solicitors, to help me with that. We will be very willing, as I just mentioned to the Chairman, to provide you with our response to your proposed legislation after they've had a chance to review it.

Mr. FILNER. All right. Thank you very much.

Mr. TAYLOR. You're welcome.

Mr. FILNER. No more questions.

Mr. BUYER. Mr. Cooley, you're recognized for 5 minutes.

Mr. COOLEY. I'll pass my time to you, Mr. Chairman.

Mr. BUYER. Thank you.

I have a question right now for Ms. Dollarhide. What is the value of changing the distinction between open circuit TV and independent study?

Ms. DOLLARHIDE. I think the Montgomery GI Bill is flexible enough to deal with some of the recent trends that are occurring in the educational community. One of the problems that we have concerns open circuit TV. Many people consider it similar to closed circuit training. As a result, the State Approving Agencies have had difficulty approving such training. If we modify the bar against open circuit TV, I think that then we will have taken care of the problem and it will open such training to more veterans.

Mr. BUYER. All right. Thank you.

We started this hearing and moved into a debate of statistics. I don't even want to hesitate to jump into all the statistics that you cited, Mr. King. I'm anxious to look at them. Knowing that you can draw lines at particular places and you said "these statistics are not rhetoric. They're the facts." I'm anxious to take a look at them.

How many alternative personnel systems have you approved?

Mr. KING. Alternative—what would there be in that? Do you remember?

Mr. BUYER. And if you know, what are some of the agencies for which you've approved?

Mr. KING. Well, we had the China Lake project—by law. That was the demonstration that went on longer. We were still young then, Mr. Chairman, when that project started. We kept it on as a continuing project. I think it went on for 15 years and that was establishing broad banding and flexibilities in pay and in the way you could rate people on performance. It was a unique situation and it was fairly broad.

Presently, there have been seven demonstrations that have operated with alternative systems. That's since 1978.

Mr. BUYER. Do you know who they're with?

Mr. KING. Yes, I can get you that entire list for the record.

Do you need them right now?

Mr. BUYER. Well, if you can get it for the record, that's fine. I'd like to know what agencies have asked for approval. How many have been granted? How many alternative systems do we have?

Mr. KING. That would have to be for the record.

(See p. 181.)

Yes, our present system, let us say—and I say this right now because I don't want to be accused of lobbying you, Mr. Chairman. Let us say it's an informational package I would put forward verbally and make it very quick, Mr. Chairman.

Mr. BUYER. I'm not laughing at you. I think that's funny.

Mr. KING. It would be that our present thing is so ritualistic it makes the breeding cycle of the whooping crane look simple and direct.

Mr. BUYER. Oh.

Mr. KING. What we would like to do is to simplify it so we could broaden and have more demonstration projects. Because as you know, with such a huge organization as the U.S. Government, we'd like to incorporate change after we see if it works. If we make mistakes, we can correct it on a mini-level.

Mr. BUYER. Do you know whether or not if any of those alternative systems include hiring, promotion and retention for veterans?

Mr. KING. I don't——

Which one is it that has that in it?

I'm sorry. My apologies. Our associate director for Merit Systems Oversight and Effectiveness, Carol Okin.

Ms. OKIN. The questions, I think, sir, relate to the Demonstration Project Authority which was enacted in the Civil Service Reform Act of 1978. There have been seven active demonstration projects since 1978. They're not all active today. All of those demonstration projects explore different ways of doing human resource management. There have been those that deal with broad banding, that deal with different ways of promotion. That's why it's a demonstration project, an experiment as far as human resource management.

Specifically, the Department of Agriculture's demonstration project dealt with treating veterans' preference in a different way. I think Director King mentioned that in his testimony.

Mr. BUYER. Right.

And what about the other six?

Ms. OKIN. Veterans' preference is not waived in a demonstration project. So, for the most part, if it wasn't specifically addressed as it was in the Agriculture Department project, it was treated as it's treated under title 5 law as we know it today. It is not waived because of a demonstration project in any circumstance.

Mr. BUYER. You can't waive?

Ms. OKIN. That's correct.

Mr. KING. That's correct. But I thought you were asking about the uniqueness. The only unique one is the Department of Agriculture one as I'm hearing your question now. That is the only one——

Mr. BUYER. This would be helpful to me here. Why wouldn't we include that in others? If part of the testimony here is about the problem with how the culture deals with the education and knowledge and getting the word out, why don't we just include it in the other systems?

Mr. KING. I think when you have—first of all, the agencies ask for the demonstration authority on the areas on which they think are problematic for them. We try to respond with them. If we see some areas, we will raise it with them.

Mr. Chairman, with all due respect—as I said, I am committed to doing better as we all are—but when almost half of your entire hires are coming out of veterans, there isn't a sense of neglect among the folks.

Mr. BUYER. Oh.

Mr. KING. No, I'm just saying, that's where it is. I'm talking about the agencies themselves when you look at the actual numbers. So when you said the statistics, I suspect that's part of it.

What we found was exactly, though, what the veterans' service organizations said. We found that managers at times weren't being responsive to certain things. For example, they talk about the 1992 report. I believe that was when we talked about our central registers. We don't operate now with central registers. That's changed since 1992, but it's not being done as a demonstration project.

If you had to hire an attorney and you had asked us in the old days, you may have gotten 1,000 attorneys to look at with one job. With the case method today, you could very well look and say to us, "could you get us an attorney?" We could get you eight people. What that would be based on is not everyone in the world who's an attorney, but folks who wanted to come to Washington, wanted to work with the Congress, and had special skills in the area you mentioned.

So, it's more tightly focused. That's why these things have changed. That's what, I think, the Department of Agriculture dramatized was that this could work with the case method and then broaden it and make it more inclusive for veterans. That's why we applauded it and that's why we support it. That's why the case method, we believe, is a better way to go than using the other traditional method, the central registers.

Just quickly, almost one-half of all the people we recommended under central registers didn't want the job. But you had to go through that whole expensive process of seeking them out, and that was a time consuming process, too. So, now we have a method that and works better. When we add this other ingredient of the demonstration project authority, we cut through what was traditional red tape and we make it better for everyone.

Mr. BUYER. Have you ever cited agencies for failing to meet veterans' preference laws or regulations?

Mr. KING. Have we ever what?

Mr. BUYER. Have you ever cited them?

Mr. KING. Yes. We just had a recent one with—because we deal with them on an individual basis.

Mr. BUYER. Which one?

Mr. KING. I don't think we've run into systemic problems. This was an individual whom we believe had not been treated fairly and not been treated correctly under veterans' preference.

Mr. BUYER. From which agency?

Mr. KING. This was the Holocaust Museum. We worked directly with them and Ms. Okin worked directly with them. That gentleman is now employed by that agency and, hopefully, has been made whole.

Mr. BUYER. You were about to say it's systemic.

Mr. KING. No, I was going to say I haven't run into—and I was going to ask whether you've run into systemic problems. Ours are generally individual problems that manifest themselves.

Mr. BUYER. Have you noted any systemic problems with any particular departments or agencies?

Ms. OKIN. I would say no, sir. As manager of the oversight function of OPM, we visit approximately 150 installations of Federal agencies a year, just on routine review activity. When there is an examining unit, which is the intake method that the agencies are now using to make their appointments, we always review the processes they use to establish certificates and get line managers applicants for selection. We always look for the appropriate use of veterans' preference, whether it has been applied correctly.

Mr. BUYER. Okay.

Ms. OKIN. When it isn't, we inform the agency in writing. They, in all cases, take corrective action and do whatever they need to do to make sure that those veterans' preference rules are adhered to and followed. Often, it's an oversight, and the agency's personnel folks are very anxious and willing to work with us to make sure those changes take place.

Mr. BUYER. Let me give you a hypothetical that's going to be very helpful to the committee as we try to seek a legislative solution to this.

I'm still a reserve officer. Let's say I leave Congress, work for a Government agency. I am involuntarily called to duty, the Pacific. When I return to my job, they say "listen, we told you you can't go." I work at the Department of Justice. We said, "You can't go, Steve." I said, "well, listen, I've got orders I have to go. I'm going." I leave. When I come back, I find out that they put me on AWOL. They said, "hey, your jobs not here. Get a box, close up. You left. We gave you that opportunity."

Now, I go and I file my complaint. They have me out on leave, or they can change the status to administrative leave. What happens to the person? Right now, you come in, you look at it and say, "wait a minute. Steve ought to have his job back." What happens to that department head? What happens to that particular person who treated me like that?

Now, you said, yes, in a lot of cases it's a mistake. In cases like that, what ever happens to that Federal employee who is not following the law? I mean, we have a VSO that recommended we ought to have the person that's grieved directly sue the person that wronged them. I'm not prepared to go that far, but tell me what happens right now?

Ms. OKIN. Well, I think the matter that you just described, though, is a matter that's under the purview of the Labor Department as far as the activity and whatever corrective action needs to be taken on that kind of specific matter.

Mr. KING. But I will say this, Mr. Chairman, and I've said this to the various groups. I meet with our veterans' groups, our veterans' service groups, on a regular basis. One of the things that I've done when I go out speaking—and I speak to a number of government manager and personnelists—I stress the fact that veterans' preference is an earned right. It is central to the merit system. It is part of the merit system. It is not up for discussion.

Mr. BUYER. Right.

Mr. KING. The one area that you did ask for, we did see something systemic.

Mr. BUYER. I don't want to confuse veterans' preference with USERRA. I mean, I put the question under the USERRA.

Mr. KING. Okay, but just on the other, I just want you to know that we are not flexible on that issue. And by the way, on the systemic, we did run into that in the Post Office. Unfortunately, we're wed at the hip to the Post Office by law. They can't appeal to MSPB without us legally going in with them, it is not a voluntary act as was said earlier. Secondly, MSPB ruled against the Post Office for the largest number of veterans I think ever impacted.

Mr. BUYER. Wait a second. Wait a second. Time out for a second. You're the director of the Office of Personnel Management?

Mr. KING. Right.

Mr. BUYER. Am I correct to ask you this question? What penalties are there for department heads, or agencies who do not follow the law and someone gets punished who shouldn't have been? Or should I be asking Secretary Taylor that question?

Mr. KING. Well, you could ask that of me. If I found someone in our agency and that was a problem, I'd take disciplinary action when that's identified.

Mr. BUYER. That's all I wanted to know.

Mr. KING. Oh, I'm sorry.

Mr. BUYER. What happens to that person—I wanted to come back on the job and they put me on AWOL. I don't have a job. I'm sitting out there. I don't have the money to pay my mortgage and I've got a family to feed, and I'm being mistreated. We find out when I get my job back that I was wronged. What kind of disciplinary action do you, in fact, take?

Ms. OKIN. I believe agency management of the specific agency affected has the full right to take disciplinary action against its employees and its managers where they have, in fact, erred. We would direct a corrective action of a specific personnel error, but as far as disciplinary action to those involved in that decision, I believe it would be left to agency management.

Mr. KING. That's up to the agency.

Mr. BUYER. Agency management decisions within their own systems?

Mr. KING. That's correct.

Mr. BUYER. All right.

Mr. King, I would be interested, if you would let us know about your position on Mr. Mica's redress proposal. You weren't here——

Mr. KING. No, no, but——

Mr. BUYER (continuing). But if you would get that to me, I would appreciate it.

Mr. KING. I haven't seen any proposal yet.

Mr. BUYER. If you could take a look at that——

Mr. KING. Mr. Mica has spoken several times and I would like to see what the legislation looks like. Because I think there were a few comments that he made in his written testimony that might suggest the legislation might need correcting to carry out his intent. I know his intent is both honorable and supportive. So, I'd like to see what the legislation looked like at the end of the day.

Mr. BUYER. Yes, thank you.

Once Secretary Taylor refers a case to your agency, what is the system for review?

Mr. KING. It comes to us from Mr. Taylor. We look at it. Last year, I believe we had five that came through. Four of them basically were explaining what the difficulty—what they perceived as the difficulty. There was one we went forward with, and in that one, corrective action was taken, I believe. There was a remedy to that particular situation.

Am I not correct?

Mr. BUYER. How many on your staff to do the review?

Mr. KLEIN. Sir, they are taken by our service centers who have the overall employment organization to take care of the hiring and so forth, and recruiting. But that's just a collateral duty of someone in that office—the director—if he gets a case to take a look at it and make a decision. We don't have a dedicated staff to handle just those cases. There aren't enough of them to handle.

These are the same people that make decisions every day about veterans' preference in the hiring system. If they see something going wrong——

Mr. BUYER. So, they're sufficiently trained?

Mr. KLEIN. Oh, yes.

Mr. BUYER. It's just that they wear another hat.

Mr. KLEIN. They're expert examiners.

Mr. BUYER. All right. All right.

Mr. KING. But by the way, Mr. Chairman, if we do make a mistake, as we did in this case in the Holocaust Museum, we will correct our own, and did.

Mr. BUYER. But of the number of people, did you answer that?

Mr. KING. No, we have 22 sites out there.

How many people are total in employ?

Mr. KLEIN. You mean the people in OPM who handle the hiring system?

Mr. BUYER. The staff size that would conduct a review of cases referred by Secretary Taylor to your agency?

Mr. KLEIN. Oh, we have in total, in all of our employment operations, about 500 people. But I'm not going to tell you that we have 500 people dedicated to this effort. They're handling all of the functions of the employment service at OPM. I would guess there's probably 1 man-year total if you add up all the collateral duty assignments of everyone handling this kind of issue.

Mr. BUYER. All right. Thank you.

Mr. King, were you present in the room to hear the testimony of Mr. Ron Drach?

Mr. KING. Yes.

Mr. BUYER. Okay. He had made——

Mr. KING. One of the extraordinarily capable people in the business, Mr. Chairman.

Mr. BUYER. Yes.

He pointed out strongly the following points. That the Office of Personnel Management, at best, gave cursory reviews to complaints, relying on the agency's report on the allegation. "With less than aggressive review at OPM, many agencies take this as a green light to ignore veterans' preference. With a hiring authority delegated to many agencies, the maintenance of a certificate of eligibles is virtually non-existent."

Now, these are the remarks of someone whom you and I both agree is highly respected.

Mr. KING. Right.

Mr. BUYER. How do you respond to these points?

Mr. KING. Well, as I say, on the five cases we received last year, four of them didn't fit in because there was no violation. The fifth one, we basically worked on and resolved to the satisfaction of the individual. So, we don't have a backlog. And we had one case last year. I don't care if there's just one, we want to be responsive and timely. We're available.

On the other hand, if there's a perception that the system is unresponsive, Mr. Chairman, I have no objection whatsoever to looking at what the veterans' service people feel might be another system that would be responsive and more welcoming. We have no difficulty in helping you with that at all, Mr. Chairman.

Mr. BUYER. Obviously, a lot of cases are taken care of before they ever get to you though, right?

Mr. KING. Yes, that is correct.

Mr. BUYER. All right. So, when you said just five, I mean, there's a whole bunch of cases out there.

Mr. KING. Well, I meant the ones that came over my threshold.

Mr. BUYER. Yes, all right.

The State Department and other similar agencies are empowered to run their personnel system somewhat differently from the civil service. During RIF considerations, many veterans expect title 5 civil service rules to apply and that is not necessarily the case. For example, the State Department has a rank-in-person system.

Can you describe what the system is and why the department employs it?

Mr. KING. My colleague has been working as a consultant to some degree.

Mr. KLEIN. Mr. Chairman, the rank-in-person system is similar to the military system where once an individual achieves a particular rank in the military, a captain or a general in the foreign service perhaps, an ambassador or designate ambassador, they retain that rank no matter what job they're placed in. That's very unlike the civil service system where once you're a GS–13, if you're put in a different job, you may be a GS–12 or a GS–14. The job holds the rank.

So, in their system, they have a central promotion system where they're reviewed each year. They're looked at for their past record. They choose who's going to be promoted during the next year, if anyone. Those who don't get promoted perhaps are asked to leave. It's very much a personal rank that they carry no matter where they're assigned.

Mr. BUYER. Are there any other agencies out there considering employing such a personnel practice?

Mr. KLEIN. Not that we're aware of. The military and the foreign service are the two principal agencies in that regard.

Mr. BUYER. The Foreign Service Act created a personnel system for foreign service employees. That system is separate from the civil service system which governs employment practices for all other Federal employees. Are veterans' preference being applied uniformly between the two systems?

Mr. KING. The veterans' preference has not, and especially as they were looking at RIFs, and they were constructing their RIF procedures. It became law, I think about 2 years ago, that the foreign service folks would have to consult with us on veterans' preference in that reduction. They have, in fact, consulted and I think there were some suggestions made if you'd like to discuss that.

Mr. BUYER. Please.

Mr. KLEIN. A little background on that. The foreign service employment system in the past had not required them to follow the title 5 and the RIF system. They were not bound by that. This past year, the foreign service committee passed a bill that required them to give "due weight" to veterans' preference. There is no requirements that they use title 5. There was no requirement that OPM approve their system. It merely said that they must consult with the Director before they proceed. They did consult and our recommendations to them were to provide more weight to veterans' preference, which they did. There was no requirement, though, that they follow our orders, so-to-speak.

Mr. BUYER. Yes, there's no requirement, but do you think it would be better if there was uniformity between the two systems?

Mr. KLEIN. Well, I don't believe that the two systems could work using the same system because they're ranking the person. They don't place people in the same kind of competitive levels and so forth that the civil service system does. So, you can't really transfer that. What their system recognizes is points based on your past record, the posts you served in, the rapidity of your promotions, et cetera.

So that, in their case, we suggested more weight be given to veterans' preference in terms of points in their promotion system. So, they've added far more points than they had before so that veterans would receive that kind of recognition in their system.

Mr. BUYER. It's also my understanding that the foreign service, the Agency for International Development, AID, and the U.S. Information Agency, USIA, are each developing their own RIF procedures. Why are three unique sets of RIF procedures being developed at these three entities?

Mr. KLEIN. Mr. Chairman, they're not required to use the same one. They were included in this bill and each of them are proceeding in a way that they believe is in their best interests for carrying out their mission. We've only seen the one. We haven't really consulted on the other two. We're waiting for some indication from them that they have a proposal.

Mr. BUYER. Yes, but what we have is one act and the one act now has created three different types of personnel systems. Is there any reason why there can't be some uniformity?

Mr. KING. I think the mission of those agencies is unique. It has operated for some years very successfully in this particular fashion. It is unique and they feel that they carry their mission out most successfully this way.

Mr. BUYER. The reason I asked the question is we have received the indication by this committee that their employees of the foreign service believe that veterans are being treated better under RIF procedures for civil service systems than their own systems. Therein lies the point of the questions that I'm asking.

Mr. FILNER. Just as a point of clarification. What bill are we talking about that governs this?

Mr. KING. Well, title 5, which covers——

Mr. FILNER. Which you said passed a year ago?

Mr. KING. Oh, I believe it was from the Senate from Mr. Helms' committee relative to——

Mr. FILNER. Figures. I'm sorry.

Mr. KING. Am I correct on this?

And it was filed that if they were going in and it looked as if there would be a reduction, such that we're looking at across Government in making it smaller, that looking at RIF procedures, in organizations that had historically not really looked at any kind of substantial downsizing in anyone's memory, that the process be really examined because it was a process that was not really——

Mr. BUYER. Have you recognized that these concerns are real among veterans? Veterans are coming to us and saying that employment in the veterans' service, "these RIF procedures by civil service are so much better." Then we've got three different types of systems here.

Is there some way we can be helpful here in the process with regard to veterans?

Mr. KLEIN. Mr. Chairman, they're an exempted agency, and OPM does not oversee the foreign service organizations as we do the rest of the civil service. The law did not require——

Mr. BUYER. Who should I be asking?

Mr. KLEIN. I think you need to talk to the State Department, foreign service organizations, or perhaps the committee that passed the bill. If that were placed in the bill that there must be a common system, then obviously——

Mr. BUYER. All right.

Mr. KING. But I think the rationale——

Mr. BUYER. I asked the questions about the common system. What is real is that even if they move to one system, RIF procedures are different than that under civil service. We've got veterans in foreign service who like the RIF procedures of civil service. I'm passing that on to you, okay. I'm just letting you know that we're receiving that up here, be it real or otherwise.

Mr. KING. Mr. Chairman, our agency has been reduced in size in the last 3 years by about 35 percent. We've lived through it. This is not an academic exercise. If you are being directly affected by a RIF, it's unfair, de facto. If you're being separated from the Federal Government because there's a genuine and honest feeling that we had a special relationship with our employees, and that was based on an unwritten contract—and I'm not talking just that it may have created an entitlement mentality that shouldn't have been there. But that entitlement mentality is real and the feelings of loyalty and dedication by the ordinary employee are there and they're very real, whether you're a veteran or a non-veteran.

When there's a feeling that there's a breach in that contract, then it's a very human reaction to feel anger and pain, and also in that, denial. Maybe these things might be irrational for many. But if you're living through it, it is very, very real.

Mr. BUYER. U.S. Geological Survey and the General Accounting Office, those do come under your—no?

Mr. KING. GAO is—Mr. Chairman, it is a legislative branch organization.

Mr. BUYER. All right. The U.S. Geological Survey?

Mr. KING. They are under——

Mr. BUYER. Okay. They don't have their own system?

Mr. KING. No, they have title 5, as any of the other executive agencies have.

Mr. BUYER. All right. Okay.

Mr. FILNER. Just for the record, again, Mr. Chairman, we are focusing here on veterans. I don't know what point you were going to make with the Geological Survey, but that was particularly hard hit by the budget decision that was made in the Congress last year. I will tell you that I have people who are scientists, who are professional people, who were complaining about the way they were treated in the RIF.

But that's a function of a budget decision that was made by the majority in the Congress. It has nothing to do with, necessarily, the culture of bureaucracy that you described. The Congress has forced on these agencies incredible situations with regard to reductions. As Mr. King pointed out so eloquently, there's going to be pain. That pain affects veterans. It affects non-veterans. It affects men and women. It affects professionals. It affects clerical. It affects blue collar, whatever, and we are hearing that. I think you're not looking at the root of the problem; you're looking at a symptom of the problem. I think the whole of Congress ought to take cognizance of it.

Mr. BUYER. The purpose of the hearing today is to look into how veterans are being treated in veterans' preference. The downsizing for the agencies, I don't want to get into a tit-for-tat, have been recommended by the President of the United States. We'll also follow those recommendations where possible. We'll also streamline governmental systems.

You know, Mr. Taylor, we've had these discussions. You, in fact, have to do it yourself. We just want to make sure veterans are treated fairly in those processes: in RIF procedures, hiring, retention, the whole issue. That's what the purpose here is today.

Mr. Taylor, I had one more for you and I'm looking for it.

Mr. TAYLOR. Okay.

Mr. BUYER. On July of 1995, I sent a letter to the Assistant Secretary of Defense, Deborah Lee, asking her about the notification requirements for pending military duty. In her August 24 response, she indicated that DOD was coordinating with the Department of Labor "for development of specific DOD instructions on USERRA implementation. One of the suggestions was to place a reminder about the need to notify employers about active duty on the reservist's active duty orders."

Can you elaborate as to the progress you two have made about the prior notification area?

Mr. TAYLOR. We have coordinated on that. As a result of our working together, she has raised the issue within DOD, and especially in the guard and the reserve, but they chose not to put that certification on orders.

Mr. BUYER. All right. Thanks for letting me know that.

Does anyone here have any questions based off of my questions before we conclude this panel?

We thank you for coming and testifying today. We also appreciate your responsiveness to the questions that we've asked here today.

To you, Secretary Taylor, when we first met, I told you that I was very concerned about keeping VETS viable and you were likewise. My respect for you has grown over the years and I appreciate what you have done.

Mr. TAYLOR. Thank you.

Mr. BUYER. Your dedication and sincerity on behalf of veterans in the country is very real. It's a shame that your voice has not been heard the way it should be heard within the Department of Labor. That concerns me a great deal.

I think we've heard some good things today and before about what VETS is doing. I'm greatly disturbed though by the lack of support for your mission, shown by the lack of funding for the NVTI at the time when the workforce initiatives garner over $6 billion in funding at the Department of Labor. I am bothered why the Department can't come up with the $3 million for the NVTI and $5 million for your homeless veterans program as requested by Chairman Stump and Ranking Member Montgomery in their letter to Chairman Porter. That, coupled with the OPM and the DOL funding priority document given to us by the Legion, certainly raises some doubts about VETS' future. Therefore, I am directing the staff—and I've had conversations with minority—to prepare legislation to move VETS to the Department of Veterans Affairs where I'm confident your program will have full support of the senior leadership.

I'd like to thank all the witnesses who are here today for their testimony.

This hearing is now concluded.

[Whereupon, at 2:12 p.m., the subcommittee was adjourned.]

APPENDIX

REPUBLICANS
BOB STUMP, ARIZONA, CHAIRMAN
CHRISTOPHER H. SMITH, NEW JERSEY
MICHAEL BILIRAKIS, FLORIDA
FLOYD SPENCE, SOUTH CAROLINA
TIM HUTCHINSON, ARKANSAS
TERRY EVERETT, ALABAMA
STEVE BUYER, INDIANA
JACK QUINN, NEW YORK
SPENCER BACHUS, ALABAMA
CLIFF STEARNS, FLORIDA
BOB NEY, OHIO
JON FOX, PENNSYLVANIA
MIKE FLANAGAN, ILLINOIS
BOB BARR, GEORGIA
JERRY WELLER, ILLINOIS
J.D. HAYWORTH, ARIZONA
WES COOLEY, OREGON
DAN SCHAEFER, COLORADO

CARL D. COMMENATOR
CHIEF COUNSEL AND STAFF DIRECTOR

ONE HUNDRED FOURTH CONGRESS
BOB STUMP
CHAIRMAN

U.S. House of Representatives
COMMITTEE ON VETERANS' AFFAIRS
335 CANNON HOUSE OFFICE BUILDING
Washington, DC 20515

DEMOCRATS
G.V. (SONNY) MONTGOMERY, MISSISSIPPI
LANE EVANS, ILLINOIS
JOSEPH P. KENNEDY II, MASSACHUSETTS
CHET EDWARDS, TEXAS
MAXINE WATERS, CALIFORNIA
BOB CLEMENT, TENNESSEE
BOB FILNER, CALIFORNIA
FRANK TEJEDA, TEXAS
LUIS V. GUTIERREZ, ILLINOIS
SCOTTY BAESLER, KENTUCKY
SANFORD BISHOP, GEORGIA
JAMES E. CLYBURN, SOUTH CAROLINA
CORRINE BROWN, FLORIDA
MIKE DOYLE, PENNSYLVANIA
FRANK MASCARA, PENNSYLVANIA

MEMORIAL DAY, 1996

by Congressman Bob Stump

Memorial Day leaves few hearts unmoved in recalling the sacrifices made by brave men and women who died in the defense of freedom and democracy. Memorial Day is not about war or peace, nor is it about a battle or an armistice. Memorial Day is about people - those who have lived, and those who have died.

There are no words to adequately describe the supreme sacrifice made by brave Americans who have died in the defense of our country. Words in the context of why we honor their memory, pale in comparison to the ultimate deeds that men and women have done for those of us now living in a free world.

What we can do for them, is to sustain the memories of their heroism - with respect, with reverence, and with our heartfelt admiration. Humble words can never repay the debt we owe these brave men and women, yet we can strive to keep faith with them and to uphold their vision of righteousness, which led them into battle and to their final sacrifice. We are, after all, the caretakers of their memory.

The determination and courage shown by countless Americans who have fought and died in battle, is symbolized in a myriad of monuments and memorials, each commemorating the deeds of untold Americans whose remains sanctify the soil throughout the world. Those who have died and those who are still missing deserve our perpetual contemplation.

President Lincoln knew this when he dedicated those hallowed grounds at Gettysburg on that cold November day in 1863.

> ***"We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that a nation might live. It is altogether fitting and proper that we should do this. But in a larger sense, we cannot dedicate - we cannot consecrate - we cannot hallow this ground. The brave men, living and dead, who struggled here, have consecrated it far above our poor power to add or detract. The world will little note nor long remember what we say here, but they can never forget what they did here."***

(more)

In World War I, America made the world safe for democracy and helped create a promising new world from the ashes of defeat. In World War II, faced with the single greatest threat to civilization the world had ever known, magnificent young Americans fought to extinguish the flame of tyranny throughout the world. America provided freedom loving people mired in a dark sea of despair, a beacon of hope and faith sustaining their anticipation of victory over oppression.

In Korea and Vietnam, Americans helped stem the tide of totalitarianism, which directly led to the demise of Communism and our ultimate victory in the Cold War. Today, America is the guardian of democracy. Americans continue to demonstrate our resolve as the sentinel of freedom in Lebanon, Grenada, the Persian Gulf, Haiti, Somalia and the Balkans.

It is up to us the living, the beneficiaries of *their* sacrifice, to commemorate the deeds of those whom we confer the epithet of patriot.

Those who have served in combat understand the unique experience of war. Each has seen the devastation of property and the horror of death. Each has experienced the sadness of the loss of a friend and understands the grief of families who have lost a loved one. To this day, many share in the anguish of those who don't know the fate of a friend or a loved one missing in action. We all stand together as comrades in arms.

How can we convey our appreciation for the meaning of this day to those who have never served?

Education connects future generations of Americans with the battles fought by their parents and their grandparents. Each generation must be taught that the willingness of some to sacrifice their lives so that others might live in freedom, is the eternal legacy of all who have honorably served our country in wars past.

For it is this history which teaches us that brave Americans who were willing to give their lives for freedom and democracy, did so for a cause they considered infinitely more important than life. None volunteered to die. Each volunteered to defend the values which brave men and women have always been willing to die for. Those values passed on to each generation of Americans are to advocate honor, to strengthen the family, and to defend our country and our flag.

Memorial Day is a national day of respect. As we honor the memory of our nation's veterans and war heroes who are no longer with us, let us pledge that their lives and their sacrifice shall not have been offered in vain, but will be remembered by us all forever.

Rep. Bob Stump (R-AZ) is the Chairman of the House Veterans' Affairs Committee. Stump, a World War II combat veteran, enlisted in the U.S. Navy in 1943 at the age of 16, and participated in the invasions of Luzon, Iwo Jima and Okinawa.

U.S. DEPARTMENT OF LABOR
SECRETARY OF LABOR
WASHINGTON, D.C.

MAY 2 1996

The Honorable Newt Gingrich
Speaker of the House
of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Transmitted herewith is the first report prepared in accordance with 38 U.S.C. 4332, as amended by the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). Section 4332 provides that the Secretary of Labor shall submit a report beginning in 1996, and annually thereafter through 2000, on the case processing activity under USERRA during the previous fiscal year. As required by the statute, this report has been prepared in consultation with the Attorney General and the Special Counsel.

Sincerely,

Robert B. Reich

Enclosure

Fiscal Year 1995 Report to Congress on the EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA or the Act) was signed into law on October 13, 1994. This Act is codified at title 38, chapter 43, United States Code. USERRA is a complete revision of the predecessor Veterans' Reemployment Rights Statute. Section 4332 of the Act requires an annual report to the Congress on case processing activity for the preceding fiscal year (FY) beginning in 1996 and continuing annually through the year 2000. This is the first such report and covers actions taken during FY 1995. This report is made in consultation with the Attorney General and the United States Special Counsel.

While USERRA revised and clarified previously existing law and case law, it also includes several new provisions. The Act provided for the first time, a means whereby employees of the Federal government could be assisted in the protection of their rights by the Secretary of Labor (Secretary) and the Office of Special Counsel, an independent agency charged with investigating and prosecuting prohibited personnel practices and enforcing other federal employment laws. The Act also provided a mechanism for the enforcement of the employment and reemployment rights of employees of Federal non-appropriated fund activities. USERRA strengthened the role of the Department of Labor (DOL) by clarifying the authority of the DOL to conduct investigations and by providing the Secretary with the authority to issue subpoenas. Additionally, the Act provided persons exercising rights and persons assisting in investigations conducted under USERRA protection from employer retaliation.

1. Cases Reviewed by the Department of Labor in FY 1995:

Cases Opened:

In FY 1995, the Veterans' Employment and Training Service (VETS) on behalf of the Secretary opened 1,387 new cases and continued the investigation of 167 cases opened in the previous fiscal year. Cases opened increased 15% over the number of cases (1208) opened in FY 1994. This increase is partially attributable to cases opened on behalf of employees of the Federal government. The remainder of the increase may be attributed to the extensive publicity and education efforts of the Departments of Defense and Labor following the enactment of USERRA.

Of the cases opened in FY 1995, 1079 (77.7%) involved private employers, 232 (16.6%) involved states or the political subdivisions of states, and 76 (5.4%) involved Federal agencies. Cases were opened on behalf of 1069 (77%) Reserve component personnel, 289 (21%)veterans, and 29 (2%) persons who were undergoing examination for military service.

Many cases involved multiple issues. Of the cases investigated in FY 1995, 494 involved complaints of employer refusal to reinstate or reemploy the individual following a period of military service; 469 cases involved discharge from employment because of military service or obligation; 48 cases involved the refusal of an employer to hire an individual with a military obligation; 28 cases involved discharging individuals during the period of protection from discharge without cause; and 13 cases involved complaints of improper layoffs because of military obligation, or layoffs because military service was not properly credited to seniority. The cases involving issues other than the hiring or firing of claimants included 138 cases that involved issues pertaining to seniority; 91 cases involved denied promotions; 91 cases involved vacation; 85 cases involved the accommodation or retraining of servicemembers; 83 cases involved pay rates; 50 cases involved employee pension benefit plan issues; 45 cases involved issues pertaining to health benefit plans; and 14 cases involved the retraining or reasonable accommodations for disabled servicemembers.

VETS issued one subpoena under the authority USERRA provides the Secretary. The case involved a single employer and eight claimants.

Cases Resolved:

In FY 1995, VETS closed 1,252 cases, of which 85 percent (1,059) were closed in 90 days or less and 91 percent (1,144) were closed in 120 days or less. At the close of FY 1995 only one case remained open for a period greater than one year. This case, which involves an employee of the District of Columbia, has remained open pending issuance of payment by the District under the settlement agreement. Investigation and processing continue for the remaining 301 cases which were opened in FY 1995.

The individuals received all, or substantially all, of that to which they were entitled under the law in 399 cases. Mutually agreeable settlements occurred in 164 cases. Individuals who withdrew their claims during the investigation numbered 136.

Investigations resulted in determination that the claims were without merit in 323 cases and that claimants were not eligible for benefits under USERRA in 57 cases. The claimant's not cooperating with the investigation, not responding to requests for additional information, or simultaneously pursuing the same claim with the assistance of a third party resulted in 104 cases being administratively closed. Sixty-seven cases were processed for referral to the Attorney General and one case was processed for referral to the Special Counsel.

VETS' actions resulted in $710,062 in lost wages and benefits being recovered for claimants.

2. Cases Referred to the Attorney General and Special Counsel:

Attorney General:

Upon the request of the claimants, VETS refers complaints involving private employers or states and their political subdivisions to the Attorney General when unable to achieve a satisfactory resolution. The Civil Division of the Department of Justice (DOJ) and the U.S. Attorneys act on behalf of the Attorney General in USERRA matters.

The DOL forwards to the DOJ a packet that contains the investigative file, analysis and recommendation of the investigator, review and recommendation of the Regional Administrator of VETS, and legal analysis and opinion of the Regional Solicitor of Labor. Based on a review of this packet, DOJ refers the case to the U.S. Attorney for further review and appropriate action or denies the claimant representation. If the U.S. Attorney is reasonably satisfied that the claimant is entitled to the benefits sought, he or she may provide representation in the appropriate U.S. district court. The statute also provides for a private right of action.

In FY 1995, the DOJ received 51 referrals from the Secretary. Based on the initial review DOJ forwarded 26 (51%) of these cases to U.S. Attorneys and DOJ declined representation in 21(41%) of these cases. At the end of FY 95 the remaining four cases (8%) were still under review.

In FY 1995, U.S. Attorneys filed complaints in district court on behalf of 10 claimants, represented two claimants at trial, and negotiated settlements in 11 cases. Two individuals withdrew their claims after the U.S. Attorneys filed complaints on their behalf. U.S. Attorneys declined to provide representation in 14 cases and returned one case to the DOL for the development of additional evidence.

Claimants recovered $236,033 in lost wages and benefits as a result of the efforts of the Department of Justice.

Office of Special Counsel:

As stated previously, USERRA clarified and significantly strengthened the employment and reemployment rights of Federal employees who perform in a uniformed service. In doing so, the Act provided new responsibilities for the Office of Special Counsel(OSC).

Under USERRA, an individual who receives notification from the Secretary of an unsuccessful effort to resolve a complaint of violation of reemployment rights between the individual and a federal executive agency may request that the Secretary refer the complaint for adjudication by the Merit Systems Protection Board (MSPB). If such a request is made, the Secretary refers the complaint to the OSC in the same manner as referrals made to the DOJ. If reasonably satisfied that the claimant is entitled to the rights or benefits sought, the Special Counsel may appear as counsel for the claimant and initiate an action before the MSPB. The Special Counsel may also represent the claimant before the

U.S. Court of Appeals for the Federal Circuit on appeal from an MSPB decision. If the Special Counsel declines to initiate an action before the MSPB, the Special Counsel shall notify the claimant of that decision. The claimant may then file a complaint directly with the MSPB.

In FY 1995 the OSC received one USERRA referral from the DOL. That case was still being considered by the OSC at the close of FY 1995.

3. Trends:

The number of cases opened on behalf of Reserve component personnel continues to increase as a percentage of the total number of cases opened. In FY 1992, 59% of cases were opened on behalf of Reserve component personnel. This percentage increased to 69% in FY 1993, increased to 75% in FY 1994, and increased again to 77% in FY 1995. This steady increase may be attributed to the growing use of the Reserve components to provide for national security, and the decreasing number of personnel in the Active components.

4. Legislative Action Recommendations:

The Assistant Secretary of Labor for Veterans' Employment and Training testified in support of certain technical amendments to title 38, chapter 43, before the Subcommittee on Education, Training, Employment and Housing of the House Committee on Veterans' Affairs on August 2, 1995. These amendments continue to be needed to provide for the effective implementation of USERRA. Accordingly, we suggest title 38, chapter 43 be amended to:

1. Accurately reflect the totality of the character of the service requirement of section 4304, which establishes the events that terminate entitlement to rights under chapter 43.

2. Clarify the circumstances under which the President can designate groups of persons to have rights under chapter 43.

3. Clarify that the standards and burden of proof set out in this chapter apply to both the anti-discrimination and anti-reprisal provisions, and that the anti-discrimination and anti-reprisal provisions are applicable to the "brief, nonrecurrent" positions described in section 4312(d)(1)(C).

4. Clarify that protection under this chapter includes not only the period of uniformed service, but also the period prior to entering service that is required to prepare for and travel to the site where the uniformed service is performed.

5. Clarify that the exemption from the cumulative period of service that an individual can serve and still be protected

by chapter 43 is restricted to service in support - either directly or indirectly - of a war or a national emergency declared by the President or the Congress.

6. Provide conformity between section 4312(d)(2)(C) and section 4312(d)(1)(C) in describing the type of position excluded from protection by chapter 43.

7. Clarify the time limit during which missed payments can be made into an employee pension benefit plan.

8. Clarify the right of the Secretary to have access to witnesses during investigations under chapter 43.

Not previously testified to, but also required for the effective implementation of this chapter is an amendment to clarify that the use of vacation or other accrued time off to perform service in a uniformed service is the option of the servicemember, and cannot be required by the employer.

These amendments to chapter 43, title 38, are incorporated in H.R. 2289, which was approved by the House of Representatives in December 1995, and then referred to the Senate Veterans' Affairs Committee.

Additionally, changes to the Internal Revenue Code are required to reconcile the qualification provisions of the Code that apply to employee pension benefit plans with the requirements of USERRA. The President's FY 1997 budget submission contains tax code revisions to accomplish these changes.

SUMMARY OF VETERANS EDUCATION BENEFITS DISCUSSION DRAFT

Section 1

Eliminate the distinction between open circuit TV and independent study.

Currently, a veteran must be concurrently enrolled in a course offered by residence in order to receive educational assistance for course pursued by open circuit TV. There is no such requirement for pursuit of any other kind of independent study. This proposal allows individuals who wish to pursue their educational programs through open circuit TV the opportunity to do so.

Section 2

Medical qualifications for flight training.

Currently, a veteran is required by statute to meet the medical requirements for a commercial pilot's certificate throughout flight training. If VA later discovers that he/she let his/her medical certificate lapsed, an overpayment may be created. This proposal would permit payment of educational benefits for flight training provided the veteran meets the medical requirements for a commercial pilot's certificate at the beginning of training and at some point between the last date of training and 60 days after that date.

Section 3

Benefits for pursuit of professional recertification and skills improvement courses.

Often, teachers and other professionals need continuing education courses in order to retain their teaching certificates or other professional credentials. Currently, VA cannot pay benefits for these courses because the individual has already reached his/her vocational goal of being a teacher or other professional. Since professionals need current credentials in order to continue in their professions, the proposal would permit payment for professional recertification courses.

Section 4

Cooperative programs

A recent innovation among colleges is to establish cooperative programs where the student works in a business establishment for less than full-time. Such students cannot receive VA benefits for this training because cooperative programs are required by statute to be full time. The proposal would allow education payments for cooperative training on a half-time or more basis.

Section 5

Recognition of credit hours granted

Currently, a veteran has to meet the requirements for a high school diploma, an equivalency certificate or has to have successfully completed the equivalent of 12 or more credit hours before he/she can receive MGIB benefits. This change would recognize that some individuals are granted credit for 12 or more credit hours without having taken "normal" in-class instruction.

PAST DEMONSTRATION PROJECTS

NAME	TIMEFRAMES	PRIMARY INTERVENTION	CURRENT STATUS
National Institute of Standards & Technology (NIST)	1988 - 1996	Broadbanding Pay-for-performance, and Staffing	Extended indefinitely by Congress (March 1996)
Department of Transportation - FAA	1989 - 1994	Retention allowances	Expired
Dept. Of Navy "China Lake"	1980 - 1994	Broadbanding Pay-for-performance	Made permanent through P.L. 103-337 in 1994
FBI New York City	1988 - 1993	Relocation bonuses and Retention Allowances	Expired (Not a chapter 47 demo project - authorized by legislation)
FAA Airway Science Curriculum	1983 - 1992	Alternative recruitment method	Expired
Pacer/Share Air Force Sacramento Air Logistics and Defense	1988-1993	Broadbanding Integrated GS/GM/FWS supervisors pay organizational Performance system	Expired

[DISCUSSION DRAFT]

MAY 29, 1996

104TH CONGRESS
2D SESSION

H. R. ____

IN THE HOUSE OF REPRESENTATIVES

Mr. BUYER introduced the following bill; which was referred to the Committee on ____________

A BILL

To amend title 38, United States Code, to improve veterans education benefits, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. ELIMINATION OF DISTINCTION BETWEEN OPEN CIRCUIT TV AND INDEPENDENT STUDY.

(a) VETERANS' EDUCATIONAL ASSISTANCE PROGRAM.—Section 3482(f) of title 38, United States Code, is amended by striking out "in part".

(b) SURVIVORS' AND DEPENDENTS' EDUCATIONAL ASSISTANCE.—Section 3523 of such title is amended—

(1) in subsection (a)(4), by inserting "(including open circuit television)" after "independent study program" the second place it appears; and

(2) in subsection (c), by striking out "radio" and all that follows through the end and inserting in lieu thereof "radio.".

(c) ADMINISTRATION OF EDUCATIONAL BENEFITS.—Section 3680A(c) of such title is amended by striking out "radio" and all that follows through the end and inserting in lieu thereof "radio.".

SEC. 2. MEDICAL QUALIFICATIONS FOR FLIGHT TRAINING.

(a) CHAPTER 30 AND 32 PROGRAMS.—Sections 3034(d)(2) and 3241(b)(2) of title 38, United States Code, are each amended by inserting before the semicolon at the end the following: "on the first day of such training and within 60 days after successfully completing such training".

(b) SELECTED RESERVE.—Section 16136(c)(2) of title 10, United States Code, is amended by inserting before the semicolon at the end the following: "on the first day of such training and within 60 days after successfully completing such training".

SEC. 3. BENEFITS FOR PURSUIT OF PROFESSIONAL RECERTIFICATION AND SKILLS IMPROVEMENT COURSES.

Clause (4) of section 3471 of title 38, United States Code, is amended by inserting before the period at the end the following: ", unless the objective of the program of education is to maintain or restore the veteran's professional or vocational certification or proficiency".

SEC. 4. COOPERATIVE PROGRAMS.

(a) DEFINITION.—Section 3482(a)(2) of title 38, United States Code, is amended by striking out "full-time program of education" and inserting in lieu thereof "program of education of half-time or more".

(b) AMOUNT AND ENTITLEMENT RATE OF MONTHLY EDUCATIONAL ASSISTANCE.—

(1) Section 3032 of such title is amended by striking out subsection (d) and redesignating subsections (e) and (f) as subsections (d) and (e), respectively.

(2) Section 3231 of such title is amended by striking out subsection (d) and redesignating subsections (e) and (f) as subsections (d) and (e), respectively.

(3) Section 3532(b) of such title is amended to read as follows: "The educational assistance allowance to be paid on behalf of an eligible person who

is pursuing a program of education on a half-time or more basis which consists of institutional courses and alternate phases of training in a business or industrial establishment with the training in the business or industrial establishment being strictly supplemental to the institutional portion, shall be computed at the monthly rate of $404 for full-time, $304 for three-quarter-time, or $202 for half-time pursuit.".

(4) Section 16131 of title 10, United States Code, is amended—

(A) by striking out subsection (e) and redesignating subsections (f), (g), (h), and (i) as subsections (e), (f), (g), and (h), respectively; and

(B) in subsection (b)(1), by striking out "(g)" and inserting in lieu thereof "(f)".

SEC. 5. RECOGNITION OF CREDIT HOURS GRANTED.

(a) MONTGOMERY GI BILL GENERALLY.—Sections 3011(a)(2) and 3012(a)(2) of title 38, United States Code, are each amended by inserting ", or has been granted credit for," after "successfully completed" both places it appears.

(b) ELECTIONS MADE RELATING TO VOLUNTARY SEPARATION INCENTIVES.—Sections 3018B(a)(1)(B) and

3018B(a)(2)(B) of such title are each amended by inserting ", or has been granted credit for," after "successfully completed" both places it appears.

(c) SELECTED RESERVE.—Section 16132(a)(2) of title 10, United States Code, is amended by inserting ", or has been granted credit for," after "has completed" both places it appears.

Statement of
Representative Wes Cooley
Committee on Veterans' Affairs
Subcommittee on Education, Training, Employment and Housing
Hearing on Veterans Preference, Reduction-In-Force, and USERRA
May 30, 1996

Mr. Chairman, thank you for calling this hearing. Thank you, as well, to all of our distinguished guests who are here to testify today. After listening to your oral presentations, I will certainly read over your written submissions.

I am particularly intrigued by the status and continued viability of the veterans preference program. I read the article in the January issue of *The American Legion Magazine* concerning executive branch avoidance of veterans preference requirements. I received several comments from constituents regarding the article.

To serve our country, many veterans willingly forgo the private-sector education and training that non-veterans receive at an earlier age. The least this country can do is to guarantee that the very government for whom veterans have dedicated their lives to protect will adequately consider their employment applications once they leave the service. This is particularly true for disabled veterans. Certainly, other social goals -- other "hiring and promotion" preferences -- should not "crowd out" employment opportunities for veterans.

Thank you, Mr. Chairman.

TESTIMONY OF
REPRESENTATIVE JOHN L. MICA
BEFORE THE
SUBCOMMITTEE ON EDUCATION, TRAINING, EMPLOYMENT, AND HOUSING

May 30, 1996

Mr. Chairman, I congratulate you for holding this hearing to examine a wide range of issues that are critically important to our nation's veterans. Thank you very much for inviting me to testify. I know that the Subcommittee on Civil Service benefitted greatly from your testimony at our hearing on veterans' preference, Mr. Chairman, and I hope my testimony will be equally useful to this subcommittee as it examines the important issues before it.

As the Chairman of the Subcommittee on Civil Service, I have become very concerned with the status of veterans in our federal workforce. I will focus my testimony today on three specific topics that affect federal employees who have served or are serving their country through military service. First, I will summarize for this subcommittee what we learned at our hearing on veterans' preference. Second, I will inform this subcommittee of the legislative steps I propose to take to strengthen and extend veterans' preference and to improve economic opportunities for those who have served in the armed forces. Third, Mr. Chairman, I would like to briefly touch on a serious problem that has recently come to the attention of my subcommittee and yours, the difficulties many reservists who work for the federal government have encountered as a result of their service.

From my perspective, Mr. Chairman, it is especially appropriate that this hearing is held today, the traditional Memorial Day. It reinforces a point that I think cannot be over-emphasized: veterans have *earned* the benefits a grateful nation has bestowed upon them. This is is the guiding principle behind the one program under my jurisdiction that is most important to veterans and their families, veterans' preference.

Over this holiday elected officials, both Republican and Democrat, have spoken sincerely of the debt we owe those who have taken up arms in defense of this nation. Such public acknowledgments of our appreciation for their sacrifices are important. Those who have served our nation so well deserve to hear publicly of our gratitude. I have no doubt that veterans appreciate these words of praise and heartfelt thanks. But they also deserve more concrete expressions of the nation's high regard for their service.

One of the concrete steps this nation has taken to reflect its moral obligation to certain veterans is to provide a preference in obtaining and retaining employment with the federal government. This preference is not available to all who have served in the military, but only to those who qualify as "preference eligibles." These days, one becomes a preference eligible primarily by receiving a campaign badge.

Although some of the rules for implementing veterans' preference are complicated, the idea behind it is straightforward: preference eligibles have earned the right to be given priority in obtaining and retaining federal jobs. To implement this policy Congress has decided that preference eligibles- and in some cases family members of deceased or disabled veterans - should be given extra points when they apply for federal jobs. Most preference eligibles receive an extra five points. However, disabled veterans are entitled to a ten-point preference. Congress has also decided that preference eligibles have earned the right to preferential treatment in reductions in force. They are to be retained over similarly-situated nonpreference eligibles.

The testimony at our hearing, Mr. Chairman, showed that veterans' preference in the federal workforce is often ignored or circumvented and its continued viability is threatened on several fronts. Let me cite the new policy of permitting widespread use of single-position competitive levels during reductions in force. The proliferation of this technique is a threat to veterans' preference. A person occupying a single-position competitive level cannot compete against anyone else if the agency decides to eliminate that position. One of our witnesses explained how the use of this technique stripped him of his rights as a veteran. Of 50 employees covered by the RIF, this Vietnam veteran -- who had been awarded the Distinguished Flying Cross, the Bronze Star, and multiple awards of the Air Medal, was the only employee who was actually downgraded.

The use of single-position competitive levels has begun to proliferate. In one recent RIF at the U.S. Geological Survey, 97.2% of 1,100 positions were placed in unique competitive levels. This policy is not illegal, but it is bad policy. It eliminates competition. It undermines veterans' preference. The policy should be changed.

Other witnesses at the hearing testified that the trend to more decentralized hiring decisions will complicate the enforcement of veterans' preference. As individual agencies implement independent hiring procedures using different rules and guidelines, it will become more difficult for Congress and OPM to oversee and enforce veterans' rights.

Our hearing also revealed widespread agreement that veterans do not have access to an adequate redress mechanism. In fact, both the American Legion and the DAV identified this as the major problem Congress should resolve.

Compounding all of these concerns is the reduction of federal hiring opportunities while the government is downsizing. I believe Congress must provide increased opportunities for those who have served the nation. Toward this end, Congressman Jon Fox (R-PA), testified in support of his bill to extend veterans' preference to Reservists and others who served in support of Operations Desert Shield and Desert Storm, even if they did not serve in the Gulf theater. This is a measure I support, and I will work with Congressman Fox to pass it.

There is another situation that also disturbs me. Many who have served honorably in our armed forces are not entitled to veterans' preference. Thus, they have no legal advantage when applying for federal jobs. But even worse, they often find themselves unable to even apply and compete on an even playing field for those jobs. They are boxed out because competition for many jobs is restricted to individuals with "status" - primarily people who are already federal employees - or because they are not employed by a specific federal agency. This is wrong.

Mr. Chairman, in his speech on Monday at Arlington National Cemetery, President Clinton reminded us that, "As we honor the brave sacrifices in battle that grace our nation's history, let us also remember to honor those who served in times of peace, who preserve the peace, protect our interests and project our values. Though they are the best-trained, best-equipped military in the world, they, too, face their share of dangers." I could not agree more.

I will soon introduce legislation to address some of these problems. My bill will strengthen protections for veterans in RIFs and expand veterans' preference to jobs that are not now covered. In addition, it will establish an effective, user-friendly redress system for veterans. Finally, my bill will eliminate artificial barriers to federal employment for individuals honorably discharged from the military after four years' service.

Let me focus for a moment, Mr. Chairman, on how my bill strengthens veterans' protection in RIFs. My bill would make it much harder for agencies to put preference eligibles in a single-position competitive level. It would prohibit agencies from placing any position occupied by a preference eligible in a single-position competitive level if the veteran in it is qualified to perform the essential functions of any other position at the same grade level in the competitive area. Instead, the agency would have to include all of the positions for which the preference eligible qualified in the same competitive level. And the bill defines when a preference eligible would be considered qualified. This will make it more difficult for agencies to say that a preference eligible is not qualified for other positions. In addition, the bill strengthens and expands the rights of veterans to be assigned to other jobs during a RIF. For example, a preference eligible would have assignment rights to any position for which he is qualified that was filled within six months of the reduction in force. Finally, agencies would be required to establish agency-wide priority placement programs for preference eligibles who are scheduled to be separated by a RIF or who are actually separated.

Mr. Chairman, as I said earlier witnesses at the Civil Service Subcommittee's hearing on veterans' preference identified the lack of an adequate redress mechanism as a key weakness in our current veterans' preference provisions. My bill would provide veterans who believe their rights have been violated the choice of a judicial and an administrative remedy. If they choose the judicial remedy, they may file a complaint with the appropriate United States district court.

The administrative remedy in my bill builds upon the complaint procedures available to reservists under the Uniformed Services Employment and Reemployment Rights Act of 1994. As you know, Mr. Chairman, the first step in this process is an investigation and an attempt to resolve the case by the Department of Labor. If the case cannot be resolved at this step, the employee may ask the Secretary to refer the complaint to the Office of Special Counsel. If the Special Counsel is "reasonably satisfied" that the complaint has merit, upon request she may represent the employee in an action before the Merit System Protection Board. The employee may file an action with the MSPB if the Special Counsel declines to represent the employee or the employee chooses not to be represented by the Special Counsel. The employee may also choose to skip these preliminary steps and file directly with the MSPB.

My bill provides for "make-whole" relief for a veteran who prevails and liquidated damages if either the MSPB or the court determine that an agency willfully violated the veterans' rights. In addition, a veteran who prevails shall receive reasonable attorney fees and litigation expenses.

Mr. Chairman, we have discussed our proposed redress mechanism with leading veterans' organizations, and their reaction has been very positive. I look forward to continuing to work closely with those groups and with you and other Members to refine this system through the legislative process.

I also know, Mr. Chairman, that you have introduced legislation to make violation of veterans' preference a prohibited personnel practice at the VA. And Mr. Solomon amended the Defense Authorization Act to do the same at the Department of Defense. These are excellent first steps. I would also propose that we consider extending these proposals to all federal agencies. I would be happy to work with you and Mr. Solomon to examine this question.

As I also mentioned earlier, my bill will provide additional employment opportunities for all veterans. It extends veterans' preference to nonpolitical jobs at the White House and in the legislative branch of government, as well as to GAO.

I am concerned that many veterans are foreclosed from competing for a substantial number of federal jobs because of artificial restrictions on the scope of competition. Frequently, only individuals with "status" - that is, who are already civilian employees - or who are already employed by the hiring agency can compete. My bill addresses this problem by providing that any person honorably discharged from the military after four years of service cannot be excluded by these restrictions. This is not a preference, but it is an opportunity to compete on a level playing field. Like President Clinton, I think Congress should honor the commitment and sacrifices of all of those who have served honorably in the armed forces, not just those who qualify for veterans' preference. This proposal would achieve that objective.

Finally, Mr. Chairman, let me address another problem of which I have recently become aware. As the members of this committee know, Congress has provided protections for private sector and federal employees who serve in the Reserves or National Guard. Unfortunately, it seems that some federal agencies have punished Reservists and Guardsmen and discriminated against them. My subcommittee staff has met with some of these individuals, and this is a problem that I take very seriously.

Federal managers need to understand that the executive branch of government is one enterprise with two basic functions, one military and one civilian. The President is the CEO of the civilian function and the commander-in-chief of the military. Thus, when a federal employee temporarily leaves a civilian job in order to perform his or her duty as a Reservist, they are simply transferring from one division of their "company" to another. Discrimination against these patriotic employees is absolutely unacceptable. I thank you, Mr. Chairman, for bringing this problem before your subcommittee. And I pledge my full support and cooperation in your efforts to correct this situation.

Mr. Chairman, this ends my prepared statement. I would be happy to answer the subcommittees' questions.

Before the

Subcommittee on Education, Training, Employment & Housing

of the

Committee on Veterans' Affairs

United States House of Representatives

Hearing

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Executive Summary

The Uniformed Services Employment and Reemployment Rights Act (USERRA) provides the same protections to state employees as it does to private employees In particular, any employee, state or private, whose USERRA rights are violated may recover by bringing a lawsuit in federal court against his or her employer

A problem has now arisen concerning the USERRA's protections for state employees This testimony addresses two questions

- *In light of the Supreme Court's recent decision in* Seminole Tribe of Florida v Florida, *is the USERRA now unconstitutional insofar as it authorizes state employees to sue their employers in federal court for violations of the Act?*

Yes In *Seminole Tribe*, the Supreme Court held that Congress may not use its powers under Article I of the Constitution to authorize individuals to sue states in federal court Because the USERRA was passed pursuant to Congress's military powers, which are Article I powers, *Seminole Tribe* indicates that the Act is unconstitutional insofar as it authorizes state employees to sue states in federal court

- *Can Congress preserve the USERRA's remedies for state employees?*

Yes If Congress wishes to maintain the principle that state employees should have the same rights and remedies under the USERRA as private employees, it can do so Although the Supreme Court has determined that Congress may not use its Article I powers to authorize *private individuals* to sue the states, it has always been true that the *federal government* may sue the states Therefore, Congress could provide that when a state violates the USERRA, the federal government itself could bring an action in federal court against the state to enforce the Act Congress could also preserve the ability of state employees to bring USERRA actions in federal court by themselves, by authorizing them to sue in the name of the federal government

These statutory devices already exist in federal law and have been upheld against constitutional challenge Because the USERRA already provides that the Attorney General may act as the attorney for any employee who claims a violation of the Act, these devices would not require additional expenditure by the federal government Nor would they expose the states to any new lawsuits or liability not already provided in the Act They would simply restore the constitutionality of the system of USERRA protections and remedies for state employees that existed prior to the *Seminole Tribe* decision

Congress could also consider the possibility that state employees could bring USERRA actions against states in state courts This method would not require congressional action, but it could make state employees' rights under the USERRA dependent in part on state law It would also mean that state employees would no longer have the same remedies available to them under the USERRA as private employees

Testimony

Background: The Eleventh Amendment

The USERRA has run into a technical problem involving an area of law -- the law of the Eleventh Amendment -- that is complicated and somewhat obscure. Therefore, it is perhaps appropriate to begin with some background on the Eleventh Amendment.

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although the text of the Eleventh Amendment may seem quite limited, the Supreme Court has long interpreted the Amendment to stand for a broad principle: the principle of *state sovereign immunity* from suit in federal court. The Supreme Court has held that the states, as sovereigns within our federal system of government, are not subject to suit in federal court without their consent.

Accordingly, even though the Amendment appears to be directed only to lawsuits brought against a state by citizens of another state (or citizens or subjects of a foreign state), the Supreme Court has held that a nonconsenting state is not subject to suit in federal court even when the suit is brought by a citizen of that very state.[1] Moreover, the state's immunity from suit applies even if the suit is based on federal law.[2]

Naturally, one might ask: if the Eleventh Amendment provides states with immunity from suit for violations of federal law, how is federal law ever enforced against the states? The answer is that the principle of state immunity from suit is subject to some important exceptions.

- First, the federal government may sue the states. States are immune from suit by private parties, but the Supreme Court has always held that the states are not immune from suit by the federal government.[3]

- Second, although a private individual may not sue a *state*, the Supreme Court has long held that a private individual may sue a *state officer* who is not complying with his or her legal obligations. In such a suit, the court may order the state officer to comply with his or her obligations under federal law.[4] However, a key limitation of this principle is that it does not permit the court to order the state to pay retroactive monetary damages. The court is limited to ordering the state official to comply with federal law prospectively.[5]

- Finally, the Supreme Court, beginning in 1976, has held that Congress may "abrogate" a state's immunity from suit in federal court.[6] By passing a statute that makes it "unmistakably clear" that Congress intended to allow states to be sued, Congress may authorize a private individual to sue a state in federal court.[7] However, this exception has now been affected by the *Seminole Tribe* decision, as is described in the next section.

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[1] Hans v. Louisiana, 134 U.S. 1, 12-16 (1890).

[2] *Hans*, 134 U.S. at 10; Louisiana v. Jumel, 107 U.S. 711, 720 (1883).

[3] *See, e.g.*, West Virginia v. United States, 479 U.S. 305, 311 (1987); United States v. Mississippi, 380 U.S. 128, 140 (1965); United States v. California, 297 U.S. 175 (1936); United States v. Texas, 143 U.S. 621 (1892).

[4] *Ex Parte* Young, 209 U.S. 123 (1908).

[5] Edelman v. Jordan, 415 U.S. 651 (1974).

[6] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

[7] Dellmuth v. Muth, 491 U.S. 223, 232 (1989).

These exceptions have provided ways in which lawsuits can be used to enforce federal law insofar as it regulates the behavior of states and their officials

The *Seminole Tribe* Case

The power of Congress to abrogate state sovereign immunity -- the third exception to such immunity mentioned above -- was long the subject of an important debate When the Supreme Court held, in 1976, that Congress could abrogate state sovereign immunity, it did so with regard to a statute that Congress passed pursuant to its power under section 5 of the Fourteenth Amendment The Court's opinion left some doubt as to whether it meant that Congress's power to abrogate state sovereign immunity existed only when it acted under its section 5 powers, or whether Congress could abrogate state sovereign immunity when acting pursuant to its other constitutional powers

The *Seminole Tribe* decision has now resolved this point [8] Overruling a contrary decision from 1989,[9] the Supreme Court has now held that Congress may not abrogate state sovereign immunity when acting pursuant to powers that it already had at the time the Eleventh Amendment was added to the Constitution -- specifically, its Article I powers Rather, Congress may abrogate state sovereign immunity, and thus authorize private parties to sue states, only when it acts pursuant to a power granted to it after the adoption of the Eleventh Amendment, such as its power under section 5 of the Fourteenth Amendment

***Seminole Tribe* and the USERRA**

Ever since 1974, the USERRA (or its predecessor, the VRRA) has provided the same protections to state employees as to private employees In particular, the Act provides that any employee, state or private, who claims a violation of the USERRA may, among other things bring an action against his or her employer in federal court The court may order an offending state or private employer to comply with the Act and to compensate the employee for any loss of wages or benefits suffered because of the employer's violation of the Act [10]

Is the Act now unconstitutional insofar as it authorizes state employees to sue states in federal court? *Seminole Tribe* strongly suggests that the answer is yes *Seminole Tribe* holds that Congress may not abrogate state sovereign immunity when it acts pursuant to its Article I powers Presumably, the USERRA, like its predecessor the VRRA, was passed pursuant to Congress's military powers under Article I, section 8 of the Constitution [11] Thus, the USERRA is an exercise of one of Congress's Article I powers Accordingly, under *Seminole Tribe*, the USERRA's provision for private suits against states in federal court is unconstitutional

A counterargument could be made *Seminole Tribe* arose in the context of a statute passed pursuant to a particular Article I power Congress's power to "regulate commerce with the Indian Tribes "[12] The USERRA was passed pursuant to different Article I powers -- the military powers One could argue that the USERRA should therefore be distinguishable from the statute struck down in *Seminole Tribe*, and that suits under the Act should simply be unaffected by that case Congress has judged the USERRA a necessary and proper exercise of its powers to "raise and support Armies" and to "provide and maintain a Navy "[13] The USERRA encourages noncareer service in the uniformed services by assuring that members will be able to return to

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[8] Seminole Tribe of Florida v Florida, 116 S Ct 1114 (1996)

[9] Pennsylvania v Union Gas Co , 491 U S 1 (1989)

[10] 38 U S C § 4323

[11] *See* Reopell v Massachusetts, 936 F 2d 12, 15 (1st Cir 1991), *cert denied*, 502 U S 1004 (1991); Peel v Florida Dep't of Transportation, 600 F 2d 1070, 1072 (5th Cir 1979)

[12] U S Const , art I, § 8, cl 3

[13] U S Const , art I, § 8, cl's 12-13

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their civilian jobs upon completion of their periods of service [14] It would seem surprising if state sovereignty could interfere with federal military recruitment

But while this argument may be quite persuasive in the abstract, *Seminole Tribe* strongly suggests that it will not work in the courts Although *Seminole Tribe* arose in the context of a particular Article I power, the opinion is written very broadly The opinion starkly states that Article I powers cannot abrogate Eleventh Amendment immunity from suit in federal court [15] In the reasoning of the opinion, the Court explained that Congress may not abrogate Eleventh Amendment immunity when acting pursuant to powers granted to it *before* adoption of the Eleventh Amendment [16] This reasoning treats all of Congress's Article I powers equally It therefore appears unlikely that the USERRA, in its current form, would be held to grant state employees a remedy in federal court

Can Congress Preserve the Protections of the USERRA for State Employees?

This section discusses some options that Congress could consider in response to the *Seminole Tribe* decision

A Using the Power of the Federal Government to Sue States

Although *Seminole Tribe* significantly affects the *third* exception to the principle of state sovereign immunity mentioned above on page 1, the *first* exception -- the ability of the federal government to sue the states -- is unaffected Congress could put this ability to work on behalf of members of the uniformed services

Currently, the USERRA provides that if a state violates an employee's rights under the Act, *the employee* may bring a lawsuit against the state To preserve the ability of state employees to recover for USERRA violations, Congress could instead provide that when a state violates an employee's rights under the Act, *the federal government*, or an appropriate official thereof (such as the Secretary of Labor or the Attorney General) may sue the state The Act could provide that, in such a suit, the federal government could obtain the same remedies now provided in the USERRA for private suits an order that the employer comply with the Act, compensate the employee for any loss of wages or benefits suffered because of the employer's failure to comply, and pay liquidated damages to the employee in the case of a willful violation [17]

Such a statutory mechanism would be constitutionally sound despite *Seminole Tribe* Although the issue of Congress's ability to authorize private individuals to sue states has been the subject of considerable debate, the rule that the federal government may sue the states has never been in doubt

The statutory mechanism of having a federal official sue states on behalf of individuals already exists in federal law The Fair Labor Standards Act, for example, requires states, like private employers, to pay their employees a minimum wage [18] The Act authorizes the Secretary of Labor to bring suit on behalf of employees who are not paid the statutorily required amount [19] The Secretary has in the past brought such suits against states, and the suits have been upheld against Eleventh Amendment challenge by every court that has passed upon the question.[20] A statute permitting the federal government or an appropriate federal official to bring suit against states under USERRA should, therefore, easily pass constitutional muster.

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[14] *See* 38 U S C § 4301(a)(1)

[15] *Seminole Tribe*, 116 S Ct at 1131-32

[16] *Seminole Tribe*, 116 S Ct at 1128

[17] *See* 38 U S C § 4323(c)(1)(A)

[18] *See* 29 U S C §§ 203(d), 203(x), 206(a)

[19] 29 U S C § 216(c)

Of course, the possibility of having the federal government sue on behalf of individual employees immediately raises a different concern — that of federal resources. Would authorizing the federal government or a federal official to bring suit to enforce the USERRA require new expenditures by the federal government? The answer is no, because the USERRA already provides for federal involvement in such suits. The USERRA provides that any employee who claims a violation of the Act may complain to the Secretary of Labor, and, if the Secretary cannot resolve the complaint, may request that the complaint be referred to the Attorney General. If the Attorney General is reasonably satisfied that the employee is entitled to the rights or benefits sought, the Attorney General may act as the attorney for the employee in a suit against the allegedly offending employer, whether the employer is a private employer or a state. Thus, free representation by federal government attorneys is already one of the benefits the Act provides to members of the uniformed services.[21] The only problem is that the statute currently provides for the suit to be brought in the name of the complaining employee; the change suggested here is simply that the suit (like analogous suits under the FLSA) be brought in the name of the federal government.

The statutory change suggested in this section would therefore be extremely small. The change would not require any new federal expenditures and it would not expose the states to any new lawsuits or liability. It would simply restore the practice that existed before *Seminole Tribe*. Suits brought against states under the Act would be exactly the same, with the same issues being litigated, the same relief being at stake, and the same attorneys representing the parties. The only change would be in the *name* of the lawsuit.

B. Using *Qui Tam* Actions

The statutory change suggested in the previous section would provide USERRA remedies for state employees. It would not, however, put state employees on an exact par with private employees, for the following reason: the USERRA provides that the Attorney General, if reasonably satisfied that a USERRA complaint is valid, *may* act as attorney for the injured employee. But what happens if the Attorney General chooses not to exercise that authority? The Act provides that an employee who has been refused representation by the Attorney General may commence his or her own action against the allegedly offending employer.[22] After *Seminole Tribe*, however, this option is not available to state employees. The foregoing method therefore does not provide for USERRA actions in federal court by state employees if the Attorney General chooses not to sue on the employee's behalf.

If Congress desired to preserve the ability of state employees to bring USERRA actions against states in federal court when the Attorney General declines to sue on their behalf, it could use a further statutory mechanism, which would be similar to what is known as a "*qui tam*" action. Having provided that the federal government may sue states under the USERRA, Congress could further provide that a state employee who alleges a USERRA violation may bring an action against the allegedly offending state *in the name of the federal government*. The employee would hire and pay a private attorney to bring the suit, but, because the plaintiff would, officially, be the federal government, the suit would not violate the Eleventh Amendment.[23]

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[20] *See* Marshall v. A&M Consol. Indep. School District, 605 F.2d 186, 188-89 (5th Cir. 1979); Dunlop v. New Jersey, 522 F.2d 504, 513-17 (3d Cir. 1975), *judgment vacated on other grounds sub nom.* New Jersey v. Usery, 427 U.S. 909 (1976); Brennan v. Indiana, 517 F.2d 1179, 1181 (7th Cir. 1975), *judgment vacated on other grounds sub nom.* Indiana v. Usery, 427 U.S. 909 (1976); Brennan v. Iowa, 494 F.2d 100, 103 (8th Cir. 1974), *cert. denied*, 421 U.S. 1015 (1975); *see also* Reich v. New York, 3 F.3d 581 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1187 (1994); *cf.* EEOC v. Wyoming Retirement System, 771 F.2d 1425 (10th Cir. 1985) (Eleventh Amendment does not apply to suit by EEOC on behalf of private employees under Age Discrimination in Employment Act). The Supreme Court, although never officially passing on this point, has suggested in dicta that it would agree. *See* Employees of Department of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279, 285-86 (1973).

[21] *See* 38 U.S.C. § 4323(a)(1). Since the USERRA only authorizes, and does not require, the Attorney General to act as attorney for those bringing complaints under the Act, expenditures could increase if, following a statutory change, the Attorney General chose to exercise the authority the Act provides more frequently than before.

[22] 38 U.S.C. § 4323(a)(2)(C).

The use of such a *qui tam* mechanism in suits against states does not have quite as extensive a track record as the method described in part A, above. However, such actions exist in current federal law under the False Claims Act, which permits any person to bring suit against anyone who has allegedly presented a false claim to the federal government. The courts that have passed on the question have held that *qui tam* actions against states are not subject to the Eleventh Amendment, since the plaintiff is the federal government.[24]

If Congress chooses to use this method, the best course would be to combine it with the preceding method. Specifically, the statute could provide that the Attorney General may bring suit, in the name of the federal government or an appropriate federal official, to obtain a remedy for a state's violation of the USERRA. That would secure the virtues of the preceding method in all cases in which the Attorney General decides to bring suit. In addition, the statute could provide that a state employee may bring a USERRA suit in the name of the federal government.

C. Relying on Actions in State Court

Seminole Tribe indicates that Congress cannot use its Article I powers to provide for suits by private individuals against states in federal court. But what about suits in state court? Since Congress has not made federal jurisdiction over USERRA actions exclusive, the Act presumably falls under the general rule that state courts have concurrent jurisdiction with federal courts to hear actions arising under federal law.[25]

Would a state court be obliged to hear a USERRA action against a state, even if the state asserted immunity from such a suit? Recent Supreme Court decisions suggest that the answer is yes. Congress may create a cause of action against states that a state's courts must hear, at least if those courts may hear analogous state-law actions against the state. The Supreme Court recently indicated that when "a federal statute does impose liability upon the States, the Supremacy Clause makes that statute the law in every State, fully enforceable in state court."[26]

Thus, it may be that, even without statutory change, state employees could enforce their rights under the USERRA by bringing actions against their employers in state court. It must be noted, however, that the cases cited in the previous paragraph were decided before *Seminole Tribe*, under a legal regime in which Congress could have provided for the suits to be brought in federal court. It is not entirely clear how the Supreme Court would rule on the question of whether Congress can create a statutory cause of action against a state that a state's courts must hear, when Congress could not provide for the same action to be brought against the state in federal court.[77] In addition, a state employee's ability to recover in state court might depend on whether the state's courts may hear claims against the state on analogous state-law causes of action.[78] Thus, the rights of state employees to recover under the USERRA might vary from state to state. Finally, of course, requiring state employees to enforce their USERRA rights in state court, while private employees may do so in federal court, would be a departure from the principle, followed since 1974, that state employees should have the same protections and remedies available to them under the USERRA as private employees.

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[23] A full explanation of the legal justification for this mechanism, and more detail about how it might work, may be found in Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 Tex. L. Rev. 539 (1995).

[24] United States *ex rel.* Fine v. University of California, 39 F.3d 957, 963 (9th Cir. 1994), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995) (en banc), *petition for cert. filed*, 64 U.S.L.W. 3642 (No. 95-1445) (U.S. Mar. 11, 1996); United States *ex rel.* Milam v. University of Texas, 961 F.2d 46, 48-50 (4th Cir. 1992); United States v. Rockwell Int'l Corp., 730 F. Supp. 1031, 1035 (D. Colo. 1990); *see also* United States *ex rel.* Moore v. University of Michigan, 860 F. Supp. 400, 404 (E.D. Mich. 1994); Wilkins *ex rel.* United States v. Ohio, 885 F. Supp. 1055, 1067 (S.D. Ohio 1995). In addition, there is support in other contexts for the proposition that, in a *qui tam* action, the federal government is the real party in interest. *See* United States *ex rel.* Hall v. Tribal Devel. Corp., 49 F.3d 1208, 1213 (7th Cir. 1995); United States *ex rel.* Kreindler v. United Technologies Corp., 985 F.2d 1148, 1154 (2d Cir. 1993), *cert. denied*, 508 U.S. 973 (1993).

[25] *E.g.*, Yellow Freight System v. Donnelly, 494 U.S. 820 (1990).

[26] Hilton v. South Carolina Public Railways Comm'n, 502 U.S. 197, 207 (1991); *see also* Howlett v. Rose, 496 U.S. 356 (1990); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239-40 n.2 (1985); General Oil v. Crain, 209 U.S. 211 (1908).

Conclusion

This testimony has described options that Congress could use in response to the Supreme Court's decision in *Seminole Tribe*. Which option, if any, Congress should follow depends, of course, on Congress's goal, and particularly on whether Congress desires that state employees should continue to have the same rights and remedies under the USERRA as private employees.

If Congress determines that its goal is to maintain the principle that state employees should have the same rights and remedies under the USERRA as private employees, then that goal could be achieved by using the methods described in parts A and B of the previous section: authorizing the Attorney General, in the event a state violates the USERRA, to bring suit against the state in the name of the federal government, and also permitting state employees to bring such actions in the name of the federal government. If Congress would be content to have the USERRA rights of state and private employees differ, in that state employees would not have the right to bring suit in federal court, and also would be content to have the rights of state employees depend in part on state law, then the method described in part C, of requiring state employees to sue in state court, could be considered.

Respectfully submitted,

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[77] *See also* Will v. Michigan Department of State Police, 491 U.S. 58, 67 (1989) ("The principle is elementary that a State cannot be sued in its own courts without its consent").

[78] *See Howlett*, 496 U.S. at 372-74, 378-79 (federal law takes state courts as it finds them); Georgia R.R. & Banking Co. v. Musgrove, 335 U.S. 900 (1949) (immunity from suit may be adequate non-federal ground supporting a state court's judgment dismissing a federal claim).

STATEMENT OF
RONALD W. DRACH
NATIONAL EMPLOYMENT DIRECTOR
DISABLED AMERICAN VETERANS
BEFORE THE
SUBCOMMITTEE ON EDUCATION, EMPLOYMENT & TRAINING
OF THE
COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
MAY 30, 1996

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

On behalf of the more than one million members of the Disabled American Veterans (DAV) and its Auxiliary, I want to thank you for allowing us the opportunity to appear before you today to discuss the issue of veterans' preference in federal employment.

Mr. Chairman, Mr. Len Gilmer, Associate National Legislative Director of the Disabled American Veterans, appeared before this Subcommittee on October 11, 1995, and presented a consensus document on behalf of the DAV, American G.I. Forum, American Legion, American Veterans of World War II, Korea, and Vietnam (AMVETS), Non Commissioned Officers Association (NCOA), Paralyzed Veterans of America (PVA), Veterans of Foreign Wars (VFW), and, the Vietnam Veterans of America (VVA). I request the incorporation of that prepared statement into today's proceedings in order to have a comprehensive record on the issues.

Mr. Chairman, during my 21 years as National Employment Director for the DAV I have gained experience in dealing with issues surrounding veterans' preference violations. There has never been a meaningful appeal redress system available to an individual veteran or a veterans' service organization (VSO) if either thought veterans' preferences were being violated (the exception being in a Reduction In Force (RIF)). In those 21 years Mr. Chairman, the Office of Personnel Management (OPM), at best, gave a cursory review of a veteran's complaint which most often consisted of a report from the alleged offending agency. That report was used as the basis for telling the veteran that no violation had occurred. An investigation of the allegations was never conducted.

With a less than aggressive enforcement of veterans' preference by OPM, many departments and agencies took that as a green light to ignore veterans' preference. OPM has consistently taken the position that they do not want to "police" federal agencies in any way.

Mr. Chairman, preference eligibles are afforded or are statutorily entitled to two protections through OPM. One is specifically related to veterans' preference and the other was added by the Civil Service Reform Act of 1978.

The first one is the "Rule of 3" (Section 3318, Title 5, U.S.C.). However, the Rule of 3 does not convey any specific "appeal rights" to the veteran. Section 3318, subparagraph (a), requires "the nominating or appointing authority shall select for appointment to each vacancy from the highest three eligibles available ..." (Emphasis added). The literal interpretation of "shall select" has never been implemented because agencies historically have returned those certificates unused. This was a ploy that was unveiled in the late seventies during the Civil Service Reform Act debate that agencies used to circumvent veterans' preference.

With the hiring authority delegated to many agencies for most jobs today, the maintenance of a certificate of eligibles is virtually nonexistent. Does this delegation of authority itself circumvent veterans' preference and violate the Congressional intent of the Veterans' Preference Act to select from certificates of eligibles? We think yes. Has it been ongoing? We think at least since 1977 and probably before.

Second, a benefit for disabled veterans was added by the Civil Service Reform Act and is contained in Section 3312(b) Title 5 U.S.C.

In essence, this provision prohibits federal departments and agencies from denying a disabled veteran employment based on a disability without first obtaining approval from OPM.

Mr. Chairman, I receive complaints almost daily, either by mail or by phone, from disabled veterans who are experiencing some employment problem. Some of these individuals are attempting to find employment either in the private sector, federal sector, state or local government. Others are worried about potential RIFs and some are concerned about affirmative action and its application to them as a qualified disabled veteran. Still others are concerned that either their attempts to obtain federal employment, maintain federal employment, or be promoted is impeded by their disability and the discriminatory effects of supervisors or others making a decision affecting their employment status.

I would have to say that the vast majority of complaints that I get are from disabled veteran federal employees (and many times postal employees) who question what affirmative action means because their employer will not recognize obligations under affirmative action. The authority and responsibility for affirmative action stems from Section 4214, Title 38, U.S.C. However, it is important to point out that since the original enactment of affirmative action by Public Law 93-508 the federal government has not enforced the Congressionally mandated requirements for employment and advancement in employment for qualified disabled veterans. It should also be pointed out that current law does not provide for veterans' preference considerations in a promotion or a transfer and all too often the agency's attitude is that veterans' preference was used to get the individual into employment and their obligation ends with that.

Mr. Chairman, in the whole context of veterans' preference, the record should reflect that there are two categories of veterans: 1.) those who are eligible for veterans' preference, and 2.) honorably discharged veterans not eligible for veterans' preference. In order for a veteran to be a preference eligible, he or she must have:

- Served on active duty in the armed forces during a war, in a campaign or expedition for which a campaign badge has been authorized, or during the period beginning April 28, 1952, and ending July 1, 1955; or

- Served on active duty as defined by Section 101(21) of Title 38 at any time in the armed forces for a period of more than 180 consecutive days, any part of which occurred after January 31, 1955, and before the date of enactment of the Veterans' Education and Employment Assistance Act of 1976 [October 15, 1976] not including service under Section 511(d) of Title 10, pursuant to an enlistment in the Army National Guard or the Air National Guard or as a reserve for service in the Army Reserve, Naval Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve, and who has been separated from the Armed Forces under honorable conditions.

Mr. Chairman, given that definition, very few of those active military servicemembers who served after October 15, 1976 are eligible for veterans' preference. However, many of them who were discharged within the last ten years are eligible for a Veterans' Readjustment Authority (VRA) appointment authorized by Section 4214, Title 38 U.S.C. Veterans who received a disability while in the armed services would be eligible for "10 point" preference.

Mr. Chairman, another concern that has been raised is the "potential proliferation of alternative personnel systems." The United States Postal Service (USPS) had the first alternative personnel system that we are aware of as a result of the Postal Reorganization Act of 1970. In the Congressional debate, it was determined that Congress wanted to assure the continuation of veterans' preference in the postal service and so incorporated it in both the statute and report language. Alternative personnel systems today may be established in two ways.

1) as a demonstration project (Section 4703, Title 5 U.S.C.) authorized by the Civil Service Reform Act of 1978; and

2) by current Congressional action. Unless Congress amends Section 4703, Title 5 U.S.C., demonstration projects are permitted to be developed "without regard to other law."

However, if Congress considers amending Title 5 to allow alternative personnel systems for other departments or agencies, Congress itself has the authority, and we believe responsibility, to assure strong veterans' preference language is included in any such legislation.

We urge you, Mr. Chairman, and members of this Subcommittee, to talk to your colleagues and request their support in assuring any new legislation, be it for a restructuring of civil service in general, or establishing alternative personnel systems that veterans' preference be made an integral part of any such legislation.

Mr. Chairman, in the October 13, 1995 testimony, we provided several recommendations and concerns. Rather than repeat them in this testimony, they are attached.

APPEALS PROCESS

I am happy to provide you our thoughts on a "redress mechanism" which should be made available to veterans who believe their veterans' preference rights have been ignored or violated. The Disabled American Veterans (DAV) believes strongly that any type of redress mechanism should include complaints of violations of Section 4214, Title 38 U.S.C. as they relate to the federal government's responsibility under affirmative action. Currently, no such mechanism exists for either alleged violations of veterans' preference or affirmative action.

The DAV, along with the other veterans' service organizations have had considerable discussion about such a process and who should be responsible. Possibilities that have been discussed include: Merit System Protection Board (MSPB); Court of Veterans Appeals (COVA); Office of Personnel Management (OPM); Equal Employment Opportunity Commission (EEOC); Department of Veterans Affairs (VA); and the Veterans' Employment and Training Service (VETS).

We believe that whatever system is put into place will ultimately be very labor-intensive and will need additional resources allocated to this function. We are cognizant of the fact that the budgetary reality of new personnel would require the reassignment of existing personnel. We believe that other organizations within the larger department should be looked at for those additional resources.

Because we are recommending you look at the possibility of providing this responsibility to the Assistant Secretary of Labor for Veterans' Employment and Training, a potential resource for additional staff would be within the Department of Labor's (DoL's) Employment and Training Administration. Another possibility of additional resources is within the DoL's Office of Federal Contract Compliance Programs (OFCCP), an office which currently includes investigatory and enforcement functions.

Some have interpreted current veterans' preference law as a form of affirmative action. No current statutory provision exists that prohibits discrimination against those veterans who may concurrently be entitled to veterans' preference or affirmative action considerations. However, a review of Section 4311, Title 38 U.S.C. titled "Discrimination Against Persons Who Serve in the Uniformed Services and Acts of Reprisal Prohibited" reveals, in part, in subparagraph (c)(1), "an employer may not discriminate in employment against or take any adverse employment action against any person . . ." A literal interpretation of that provision would indicate that veterans who believe their rights have been violated as a result of their military service or discrimination has taken place have protections under this section of law. However, absent from Section 4311 is a mechanism through which an aggrieved individual may file a complaint. We believe implicit in this legislation is an obligation by DoL to receive and investigate such complaints and provide enforcement mechanisms to make the aggrieved individual "whole."

With this in mind, we are suggesting an amendment to Section 4311 that would provide that type of mechanism.

Because of other existing processes for the public in general (such as those contained in EEOC and MSPB), we are concerned about how long it will take an individual's complaint to be resolved. We recommend the following process:

STEP 1

The veteran must file a complaint with the agency that allegedly violated his or her rights within 30 days of the alleged incident or notice of non-selection. The agency will have 30 days to resolve the complaint internally to the satisfaction of the individual. At the end of 30 days, if the individual is not satisfied, he or she may forego further rights under step 1 and proceed to step 2.

STEP 2

If the agency does not resolve the complaint in 30 days or issues a decision unfavorable to the veteran, the veteran will have 15 days to appeal to the Director for Veterans Employment and Training (DVET). The DVET will have 60 days to resolve the matter. If at the end of 60 days the decision has not been rendered or at any time during the 60 day period an unfavorable decision is issued, the veteran will have 15 days to proceed to step 3.

STEP 3

If the veteran does not receive a timely decision or the decision is unfavorable, the veteran may then file within 15 days with the Secretary of Labor. The Secretary will have 60 days to resolve the complaint and at any time may refer the case to the Solicitor General for subsequent prosecution in Federal District Court. If at the end of sixty days the veteran is still not satisfied, he or she may initiate action in Federal District Court on their own motion.

During any part of this process, the investigating body should make all attempts at conciliation to try and resolve the complaint at the earliest stages.

We believe that violations of veterans' preference and affirmative action provisions should be considered prohibited personnel actions.

REMEDIES

In the event a finding is made that "discrimination" has occurred, the individual will be offered the job or a comparable job at the same pay level effective the date of the individual's application. Concurrently, the individual will be provided with all back pay and benefits including crediting of the time lost for retirement, leave purposes, and any other employment benefits associated with full time employment including career status. Any back pay must come from existing agency appropriations and no "innocent" individual should be penalized by virtue of losing a job or promotion in order to make the veteran whole.

We offer this as a starting point to open a dialogue on designing the best system possible. We'd be happy to work with you and your staff to further refine and perfect this concept. Thanks for allowing us this opportunity.

VETERANS' PREFERENCE IN RIF

Downsizing of the federal workforce has generated a whole new set of charges. Now the thesis is that veterans' preference in reduction-in-force (RIF) will undo the results of years of affirmative action for women and minorities. In essence, the argument is veterans are white males in senior positions in the federal workforce. Thus, any protection afforded these individuals will necessarily have an overwhelming impact on women and minorities who are more recent entrants to the federal workforce.

These largely anecdotal, unsubstantiated claims have been used to justify federal agency efforts to avoid RIF procedures dictated by title 5, United States Code. In addition, federal agencies, such as United States Postal Service (USPS), evoke Vice President Gore's National Performance Review reinvention rhetoric to justify their agencies' creative RIF processes designed to avoid veterans' preference requirements. For example, in March 18, 1993, testimony regarding the USPS 1992 reorganization before the Senate Governmental Affairs Subcommittee, Postmaster General Marvin Runyon indicated that, under his leadership, USPS was "...on the leading edge of reinventing government, already doing many of the things that the Administration, the Congress and this Committee want to do for the federal government as a whole."

A March 30, 1993 memorandum from Mary S. Elcano, Vice President, General Counsel, USPS, laid out a strategy for "Why Postal Service decided not to run a RIF." The purpose of the memo was to develop a strategy for the agency to defend its failure to provide veterans' preference in RIF by calling the Agency actions a reorganization. In part, her memorandum states:

> It has also been found that women and minorities comprise a large portion of the non-veteran group and RIF procedures can affect those employees in a way that seriously impairs the affirmative action accomplishments of an organization.

An August 11, 1993 Washington Post article by Bill McAllister indicated "No less a figure than Vice President Gore has praised Post Master General Marvin T. Runyon for shrinking the Postal Services Management."

To the consternation of the USPS, the Merit System Protection Board ruled that the much touted USPS reorganization was a RIF and that veterans had been denied their veterans' preference rights. The USPS continued to argue that it was simply a reorganization and exhausted its appeal rights. For the USPS to obtain a reconsideration before the Merit System Protection Board or appeal its case to the Federal District Court, the law required OPM to intervene in its behalf. The OPM did just that.

At the same time, the OPM circulated draft rules which would have, after the fact, adopted the USPS procedures which the MSPB had just decided violated the law. Ultimately, the White House interceded with the Justice Department to block the OPM appeal on behalf of the USPS.

The Government Accounting Office (GAO) has also resorted to creative data analysis to argue that RIF procedures, including veterans' preference would decimate its affirmative action efforts and therefore should be granted the authority to write its own RIF personnel rules. A March 27, 1995 Washington Post article by Mike Causey indicates that:

Comptroller General Charles A. Bowsher said the agency would lose two-thirds of its women and half of its minority evaluators, undoing a decade of efforts to diversify and professionalize its workforce. Many of the workers Bowsher wants to retain lack the protection of longevity and have no military service to give them veterans' preference.

When the Associate National Employment Director for the Disabled American Veterans contracted the Assistant Comptroller General for Operations Joan Dodaro, she explained that the GAO projected reduction in force figures had been provided to the Washington Post for "dramatic effect" and did not reflect RIF impact on the whole agency. The Causey article went on to indicate "under current rules, short-service non-veterans -- many of them women and minorities -- are most likely to be fired."

The OPM data shows that for the twenty-five agencies monitored by OPM, minorities and females suffered RIF less frequently than their percentage in the workforce in eleven agencies. Disabled employees fared better in six agencies, and, veterans did better in only seventeen agencies. Veterans were disproportionately RIFed in eight of the twenty-five agencies.

On February 1, 1994, the GAO testified before the Subcommittee on Civil Service and Subcommittee on Compensation and Employee Benefits, Committee on Post Office and Civil Service of the House of Representatives on the EEO implications of RIF. Not once did the testimony indicate the effects of the RIF on veterans. The agency selections were based on large female and minority population numbers. This selection criteria ensured the data would show a veterans' preference impact, particularly on women. According to GAO, "We selected the location that had the largest percentage of women and minorities before the RIF to maximize our chances of having sufficient data for statistical analysis." The GAO ignored important affirmative action considerations by not reporting whether or not the proportion of women and minorities in the federal workforce at the sites studied were the same, more or less than the frequency of minority and women's participation in the civilian labor-force. The GAO conclusions were based on hypothetical RIFs. Thus, their conclusions are not borne out by the real world experience reflected in the previously cited OPM data.

However, even with these potential shortcomings in their testimony, the GAO did acknowledge that while minorities were disproportionately separated from the federal workforce at three locations reviewed, women were only separated disproportionately at two locations. The author then justified the disproportionate impact on minorities by indicating, "In other cases, the disproportionate separations occurred because minorities occupied a large proportion of the positions abolished." (Emphasis added.) Thus, the disproportionate separation of minorities is rationalized by the study design, ignores the bias regarding women, and makes no mention of the effects of RIF on veterans.

Mr. Chairman, this concludes my testimony and I would be happy to answer any questions you may have.

FROM:
THE STATEMENT OF LENNOX E. GILMER
BEFORE THE HOUSE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
SUBCOMMITTEE ON CIVIL SERVICE
U.S. HOUSE OF REPRESENTATIVES
OCTOBER 13, 1995

RECOMMENDATIONS AND CONCERNS

While the details of a veterans' preference procedure may change, *we urge the Congress to maintain veterans' preference principles* and ensure that the system can provide meaningful monitoring and oversight for uniform implementation of the law.

We also wish to acknowledge OPM's frequent meetings with veterans' service organizations and the many briefings by this administration regarding their draft civil service reform proposals.

We are concerned that the reduction of OPM staff, decentralization of personnel functions, and contracting for previously provided OPM services, will reduce the development of adequate veterans' preference policy oversight and monitoring. For example, we have been informed that the OPM Career Entry Group unit will be virtually done away with. Housed within that unit are personnel who decide whether or not federal agencies may pass over veterans in hiring and whether or not an agency has inappropriately found a veteran rated at 30 percent medically unsuitable for a position.

Historically, OPM has stringently applied veterans' preference laws, disallowing the vast majority of passover of veterans and finding in favor of the veteran in the case of medical unsuitability. In these cases, the agencies have already made a decision that they do not want to hire the veteran. If OPM gives up its authority in this area, the agency will make its own decision. Why should the agency reverse itself? We believe the agency will find its reasons for not hiring the veteran fully justified.

We urge the Congress to require OPM to maintain passover and medical unsuitability decision making at the OPM level.

We believe that one of the greatest detractors from veterans' preference is the tremendous number of non-competitive and excepted appointing authorities. We believe that as agencies increased control over the maintenance of registers, utilization of more subjective ranking tools, and appointing authorities which do not require rating and ranking of candidates, veterans' preference has suffered. Special hiring authorities, such as that agreed to in the settlement of the Luevano lawsuit, have been created which do not require veterans' preference in appointment. *We encourage this Congress to reduce the number of non-competitive and accepted appointing authorities.*

RIF is probably one of the most demoralizing personnel actions to affect an agency's workforce. Even those who continue in employment are adversely affected emotionally. As was previously cited in this testimony, federal agencies have attempted to creatively avoid veterans' preference in reduction. Most notably, the USPS in 1992 conducted what it referred to as a reorganization. Ultimately, the Merit System Protection Board (MSPB) ruled that the reorganization was a RIF and that the USPS had violated veterans' preference eligibles' rights. The USPS exhausted its legal remedies when it appealed to the MSPB for a final decision. Because the USPS disagreed with that adverse decision as well, it appealed to OPM, which under the law, would have to request reconsideration at the Board and failing in that effort, appeal the decision to the federal court. OPM interceded on behalf of the USPS.

BEST COPY AVAILABLE

Finally, the President, at the request of veterans' preference organizations and VA officials, prevailed on the Justice Department to drop the appeal filed in Federal District Court. However, in the meantime, OPM was circulating draft rules, which if they had been adopted, would have incorporated the disputed illegal practices of the USPS in RIF rules. In effect, this would have authorized the USPS to do what it had just been ordered by MSPB not to do. Veterans' service organizations were successful in opposing these rule changes inside OPM.

It is interesting to note that the U.S. Court of Appeals District of Columbia Circuit decided on June 29, 1983 that a USPS "Reorganization" in 1975 had been found similarly in violation of RIF procedures, but did not require the agency to reverse its actions because there was no loss of pay. *Benjamin Franklin American Legion Post No. 66, et al. v. United States Postal Service*, 732 F.2 945 (DC, 1983). Thus, the USPS did not learn from its first mistake, or, some might argue, did learn from its first mistake and assumed it could get away with it again.

The Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (Public Law 103-236) at Section 611 authorizes the State Department to write its own RIF rules. "AFSA News" flier dated April 7, 1995 outlines State Department proposed rules to implement their new RIF personnel policies.

> As outlined in 94 STATE 269920, the Department's proposed regulations first provide for review of those members in a given competition group (i.e., a group defined by class and skill code, whose members are competing against each other for retention) of employees who are untenured or serving on LCEs. These employees will be rank-ordered according to merit. Next, the remaining employees in the competition group are ranked according to merit, and the resulting order of merit list is divided into three parts: bottom 25 percent, middle 50 percent, and top 25 percent. Employees will then be riffed according to reverse order of merit in the following sequence: non-military preference employees in the group of untenured members or those serving on LCEs, military preference employees in the group of untenured employees or those serving on LCEs, non-military preference employees in the bottom 25 percent, military preference employees in the bottom 25 percent, non-military preference employees in the middle 50 percent, military preference employees in the middle 50 percent, non-military preference employees in the top 25 percent, military preference employees in the top 25 percent. Within each military preference subgroup, veterans with compensable service-connected disability of 30 percent or more will be riffed only after all other military preference employees in the subgroup.

Thus, the State Department undoes veterans' preference as accorded all other Executive Branch employees who are covered by Title 5 U.S.C. Unlike the RIF provisions covering Title 5 personnel, the State Department RIF rules RIF veteran career employees before non-veteran career employees rated in a higher merit group.

The U.S. Geological Survey (USGS) may have found an interesting method of reducing RIF preference by creating numerous one-person competitive levels. If an agency abuses the assignment of personnel to competitive levels, it impacts veterans' rights to bump in or retreat to positions in their competitive level. We believe that federal agencies sometimes adopt this technique to protect certain employees from bumping by veterans' preference eligibles.

We are very concerned about the creativity of federal agencies as they attempt to avoid the effects of veterans' preference in RIF. *We encourage that this area of the law be strengthened, making it clear that for veterans' preference eligibles, an assignment to a reduced grade, although they continue to be paid and maintained at their old grade level, constitutes a RIF from which they would derive veterans' preference RIF protections. Veterans should have the right to appeal veterans' preference RIF violations to the MSPB. We believe that all federal agencies should be subject to these requirements. We see no need to exempt any federal entity from these obligations.*

We have noted that Administration proposed civil service reform includes unlimited personnel research programs and demonstration projects. We are concerned that the adoption of what is described as the Administration proposal would allow an agency as large as DoD to declare its whole personnel system a research or demonstration project which ultimately OPM could approve, all without approval of the Congress. *We believe this authority is much too broad and would seriously impact the need for uniformity in the application of personnel rules to federal employees.* We agree that there should be a mechanism for the federal government to conduct personnel research and through demonstration projects, however, we think there should be a limit in the size of the project and that OPM not have the right to waive veterans' preference principles. *We believe that final option of personnel practices should include the oversight of the Congress with adoption into law where necessary.*

The Administration has proposed the creation of an appointing authority which would allow term appointments for up to five years. After a period of time, employees hired under this authority could be non-competitively converted to permanent employees. Although the Administration proposal provides for the initial hiring to incorporate veterans' preference, the Administration language does not limit the final appointment to the job in which the person was temporarily hired. Thus, the appearance is that the Administration, while providing veterans' preference in the initial term appointment, might convert such person to any career position without regard to veteran status. *This undoes veterans' preference in appointment to career positions.* At the minimum, such authority should require that a person hired under this authority only be converted into a career appointment in that position.

We frequently receive calls from veterans alleging that their veterans' preference rights have been violated by federal agencies. At this time, they have no administrative recourse which will ensure a prompt, in-depth investigation or response to their concerns. Additionally, even when the agency admits they created an error, denying the veterans their preferential rights, the remedies are generally benign.

For example, a veteran might be improperly passed over by a federal agency in initial appointment. If the agency's errors are discovered, the agency simply offers the veteran a priority placement the next time they fill such a position. Thus, the veteran is denied employment illegally and may or may not ever be placed in a federal job. *We recommend amendments to current law providing veterans a complaint process which, in its initial stages, would be informal but would allow for appeals ultimately to the federal courts. This legal language should incorporate remedies which would provide the veteran all benefits of employment as though the original error had not been committed.* Thus, they should receive a job with seniority pay and all of the benefits as though they had been properly hired initially.

Title 38 U.S.C. Section 4214 requires federal agencies to write a disabled veteran's affirmative action plan for compensably disabled veterans. OPM has implemented their obligation under this law by simply certifying agency plans that meet the regulatory requirements. OPM rules do not require oversight, monitoring or a process ensuring affirmative action is applied in hiring or promotion. Thus, most of the agency plans are so benign as to have no effect.

For disabled veterans' affirmative action to be treated seriously, we believe the law must require a process which will define the intent of Congress. *We urge this Subcommittee to amend current law consistent with court rulings to provide for affirmative action to be taken among the top equally qualified candidates and requiring that disabled veterans be selected for promotion.* In this scenario, if a compensably disabled veteran is competing for a merit promotion, and the disabled veteran is rated as qualified as the most qualified candidate, then the disabled veteran must be selected for the position.

We believe that efforts beginning with the Carter Administration to modify veterans' preference have created a culture which is resistant to veterans' preferences as a concept in federal civil service. We believe that without centralized enforcement and oversight ensuring uniform application of veterans' preference, the various separate agencies are likely to undermine any veterans' preference law passed by the Congress. If there is not a centralized monitoring and oversight responsibility maintained in an agency, such as OPM, we believe that uniform application of veterans' preference will be lost. The Administration plans to streamline and downsize federal agencies, including the Office of Personnel Management, along with fiscal restraint imposed by this Congress, will result in the loss of a central adjudication of passover and medical unsuitability veterans' protections. *We urge the adoption of legislative language which will require the maintenance of veterans' preference monitoring and oversight as well as passover and medical unsuitability responsibilities to assigned personnel in OPM.*

STATEMENT OF EMIL W. NASCHINSKI, ASSISTANT DIRECTOR
NATIONAL ECONOMIC COMMISSION
THE AMERICAN LEGION
BEFORE THE
SUBCOMMITTEE ON EDUCATION, TRAINING, EMPLOYMENT AND HOUSING
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
ON
VETERANS' PREFERENCE REFORM
MAY 30, 1996

Mr. Chairman and distinguished members of the Subcommittee. The American Legion appreciates having this opportunity to share its views on the reform of veterans preference. Attached to this statement is a copy of Resolution #1, entitled *Veterans Preference Reform*, which was adopted by The American Legion's National Executive Committee in May of 1996. Also attached is a copy of Resolution #134, entitled *Veterans Preference*, which was adopted at The American Legion's 76th Annual National Convention in 1994. We respectfully request that both resolutions be made a part of the record of this hearing.

The third item that is attached to our written statement is a copy of an article entitled *With Preferences Like These...*, which appeared in the January 1996 issue of *The American Legion Magazine*. That article reports on some of the violations of veterans preference statutes that were uncovered by one of the magazine's staff reporters who was doing research for a routine article on veterans preference. We request that it also be made a part of the record.

The fourth item attached is our pamphlet entitled *Questions and Answers About Veterans Preference*. This pamphlet is provided free to anyone with questions on the topic. We request that it also be made a part of the record.

Mr. Chairman, as you and the members of this Subcommittee know, America's recognition of her war veterans dates back to the Revolutionary War. That recognition was formalized in March of 1865 when Congress passed legislation that gave federal hiring preference to service-connected, disabled veterans of the Union Army.

Congress realized that those who had fought to protect and preserve the Union, and who had become disabled as a result of that service, would have great difficulty in securing employment. It believed that the Civil Service Act would provide a modicum of relief for disabled veterans by providing them an opportunity to share in this nation's prosperity.

Over the next few decades, a number of laws, administrative rules and executive orders regarding veterans preference came into being. One of those laws was enacted at the end of World War I when veterans preference was expanded to include non-disabled veterans and the widows of veterans who died as a result of their military service. Today, those who are eligible for veterans preference are known as preference eligibles. Mr. Chairman, in this statement, the word "veteran" will refer to all preference eligibles.

When The American Legion was founded in 1919, one of it first goals was to convert the existing patchwork of laws, administrative rules and executive orders into one national policy that would be protected by law. That goal was realized 25 years later when President Roosevelt signed the Veterans Preference Act of 1944 into law. That legislation recognized the sacrifices of America's war veterans by providing a slight advantage in federal hiring and retention.

The purpose of the Veterans Preference Act of 1944 was not to create a federal workforce made-up entirely of veterans, but rather, to address the readjustment needs of the men and women who had served their country during a time of war. It also was meant to assist them in regaining the lost ground their civilian careers had suffered as a result of the months and years spent in military service.

In the beginning, federal government gladly complied with the provisions of the new veterans preference law. Unfortunately, however, as time passed and the memory of war faded, so did America's concern for fulfilling her obligation to her citizen-soldiers. Today, the provisions of the original legislation and its amendments as codified in Title 5, U.S.C. are, for all intents and purposes, meaningless.

Mr. Chairman, The American Legion believes that there are several reasons for this. First is the fact that many federal managers do not understand the reason for granting veterans preference to those who fought to keep this country free, nor do they understand how it works. That problem is compounded by the fact that many veterans are unclear about their rights under veterans preference statutes.

The American Legion's National Veterans Preference Committee recognized those problem a number of years ago and published a pamphlet entitled *Questions and Answers About Veterans Preference*. It was to meant to answer the questions veterans most commonly ask about this entitlement. It was also meant to be a tool for educating the general public about veterans preference. *Questions and Answers About Veterans Preference* was widely distributed through The American Legion's 15,000 Post.

Another problem stems from the fact that the Affirmative Action legislation that was enacted in the early '70s required federal agencies to establish "goals" and "timetables" for the recruitment of women and minorities for careers in civil service. Because veterans preference is an earned entitlement and not an Affirmative Action program, there have never been quotas for the hiring of veterans. As a result, there was/is very little incentive for federal agencies to hire veterans. While The American Legion does not oppose increasing employment opportunities for women and minorities, we do object to the fact that all too often that goal has been accomplished by denying veterans their rights under veterans preference laws. In addition, with 30% of the armed forces being minorities, and 11% being women, there are ample opportunities to hire women and minorities who are also veterans.

Another problem is that under Affirmative Action, women and minorities are protected from discrimination by the rules and regulations of the Equal Employment Opportunity Commission's

(EEOC). As a result, those protected by EEOC may file a formal complaints if they feel they have been discriminated against in hiring, promotion or retention. Unfortunately, that same protection is not afforded to veterans because veterans preference is not an Affirmative Action program.

As a matter of fact, Mr. Chairman, The American Legion believes that this is the major problem with veterans preference. Veterans have never had an adequate redress system for instances of discrimination. As a result, federal managers have routinely discriminate against veterans. Their rational is that veterans preference prevents them from hiring the most qualified person for the job or because they feel that it discriminates against women and minorities. What they fail to realize is that veterans preference is completely neutral with regard to the veterans gender and ethnicity.

With the mandatory downsizing of federal government, many federal agencies have become extremely creative in finding ways of circumventing veterans preference regulations. Probably the best example of this is what happened to veterans during the 1992 reorganization of the U.S. Postal Service. As you may remember, Mr. Chairman, the Postal Service conducted a reduction-in-force (RIF). However, because it was not called a RIF, and because employees who were downgraded where allowed to keep their pay and grade, the Postal Service was able to prevent veterans from exercising their RIF rights under veterans preference.

If Congress is serious about improving veterans preference, it must provide a clear, independent and user friendly redress mechanism that can be utilized by veterans who believe that their veterans preference right have been violated.

Second, The American Legion believes that federal managers will continue to circumvent veterans preference until such time as they are held accountable for their actions. If a federal manager knowingly disregards veterans preference rules and regulations, that person should be subject to being fired, demoted or otherwise disciplined. They should also be held accountably if they allow policies to develop that establish a pattern or practice of discrimination against veterans, especially disabled veterans, in hiring, promotion, retention or in the appeal of such rights.

If legislation is introduced as a result of this hearing, The American Legion feels that it must contain language that will require federal agencies to be certified annually as being in compliance with all veterans preference statutes. The American Legion recommends that section 4214 of Title 38, U.S.C. be expanded to include the total number of veterans hired, the hiring authority used by the agency to hire them, and the grades and positions for which they were hired.

Mr. Chairman, we believe that Congress must also give serious consideration to impounding the funding for any federal agency that fails to comply with those requirements. We do not believe that funding should be restored until such time as appropriate corrective action has been taken by the agency.

Our last recommendation is that veterans who believe that their veterans preference rights have been violated, must be given the right to sue an agency that is guilty of violating their veterans preference rights. We also recommend that if a federal official is determined to have violated a veterans right, that person should lose the privilege of sovereign immunity so they can be sued for damages by the affected veteran.

Mr. Chairman, The American Legion has reviewed the first annual report to the Congress on the Uniformed Services Employment and Reemployment Rights Act. We are satisfied that the Veterans Employment and Training Service has made a good accounting of itself on this important statute.

We would like to comment on one item regarding USERRA. Legislation is currently pending before the House of Representatives which would amend the Internal Revenue Code of 1986 to provide special rules relating to veterans' reemployment rights under USERRA. Many members of the Selected Reserves and National Guard called to active duty to support he Bosnia peacekeeping operation will lose significant pension benefits when they return to their civilian careers. Current law limits the amount of contributions to a pension plan in a given year, despite circumstances which may have prevented individuals from participating in their plans during that time period. Because of the contribution limit imposed by law, Selected Reserves and National Guard personnel serving in Bosnia during tax year 1995 will not be allowed to make up missed contributions to their pension plans in tax year 1996 if they contribute the maximum allowed by law for tax year 1996.

The American Legion believes that members of the Selected Reserves and National Guard should not be penalized with regard to their civilian pension plans because they were ordered to active service. The American Legion is requesting your support in expediting the passage of H.R. 3104 or H.R. 1469 for members of the Selected Reserves and National Guard now serving in support of the Bosnia operation.

Mr. Chairman, that concludes our statement. On behalf of The American Legion's 3 million members, thank you again for allowing us this opportunity to share our concerns and recommendations. We will be happy to respond to any questions you or your colleagues may have.

attachments

NATIONAL EXECUTIVE COMMITTEE
OF
THE AMERICAN LEGION
INDIANAPOLIS, INDIANA
MAY 1-2, 1996

Resolution No: 1

Subject: **Veterans' Preference Reform**

WHEREAS, The American Legion has supported preference in Federal hiring for America's war veterans as a method of recognizing honorable and heroic service since 1919, and

WHEREAS, The Veterans' Preference Act of 1944 provided war-time veterans with preference in Federal competitive examinations, hiring, and reductions-in-force, and

WHEREAS, Since 1992, veterans' preference has eroded due to changes in Federal hiring practices implemented as a result of the efforts to make government more efficient, and

WHEREAS, This erosion is the direct result of Federal hiring officials ignoring veterans' preference statutes, now therefore be it

RESOLVED, By the National Executive Committee of The American Legion in regular meeting assembled in Indianapolis, Indiana, May 1-2, 1996, that The American Legion supports legislation which will restore veterans' preference in Federal hiring to the status it held after the passage of the Veterans' Preference Act of 1944 and prior to the Civil Service Reform Act of 1978, and be it finally

RESOLVED, That The American Legion supports legal sanctions against agencies and individuals who willfully violate or ignore veterans' preference statutes

SEVENTY-SIXTH NATIONAL CONVENTION
OF
THE AMERICAN LEGION
MINNEAPOLIS, MINNESOTA
SEPTEMBER 6, 7, 8, 1994

RESOLUTION NO 134

SUBJECT VETERANS PREFERENCE

WHEREAS, Our federal government specially selected as mentally, morally and physically fit, certain members from its society, specially trained this group, subjected them to stringent rules and regulations, removed them from home, family and employment, asked of them a special sacrifice, and required some of them to suffer wounds they will live with forever, and

WHEREAS, A grateful nation through its representatives in the Congress of the United States and state legislatures, has in recognition of that special service and loss of employment opportunity while defending the country in time of need, extended a long history of employment the returning veterans by enacting the Veterans Preference Act as contained in Title 5, USC, and Chapter 3-3, South Dakota Code, and

WHEREAS, The term "veteran" includes every category of society -- sex, age, religion, ethnic group, race and creed, and

WHEREAS, Absence from the highly competitive job market due to military service creates an unfair and unequal burden on veterans in competing for federal and state jobs, and

WHEREAS, The Veterans Preference Law accomplished the legislative purpose of honoring veterans and provides a small advantage in competing for federal and state jobs, and

WHEREAS, There are prominent groups and individuals in the United States today who ignore the employment disadvantages accrued by individuals due to military service, who blindly allege that veterans preference is "discriminatory", who blatantly overemphasize the advantages of veterans preference although presumably aware of the fact that approximately 38 million veterans in our population have not chosen or have not been successful in obtaining a federal or state position, now, therefore, be it

RESOLVED, By The American Legion in National Convention assembled in Minneapolis, Minnesota, September 6, 7, 8, 1994, that the President of the United States and governor of each state be informed that this organization deplores each and every attempt to degrade, dilute or modify the historical precedent of giving job eligibility preference to those who are taken from their communities to serve their country in time of war, and that the President and governors reject any and all proposed legislation that would reduce employment opportunities for veterans in the federal or state work force, and be it further

RESOLVED, that The American Legion strongly support veterans' preference in federal, state, and local employment, as provided by a grateful nation, and oppose any effort to reduce this preference, and be it further

RESOLVED, that The American Legion reaffirms its strong opposition to any and all efforts to nullify or circumvent existing veterans preference statutes

With Preferences Like These...

For job-seekers, being a veteran used to mean you got a leg up. Now it often means you get a thumbs down.

WHEN John Minnick applied for a public-relations position at the federally sponsored Holocaust Museum in Washington, D.C., he felt optimistic. After all, he had a solid track record of related experience, coupled with managerial expertise. And because it was a federal job, Minnick—a disabled veteran—thought that veterans-preference statutes would give him just the edge he needed.

"My application was one of four selected by the Office of Personnel Management and forwarded to the Holocaust Museum personnel director," says Minnick, who learned through a friend at OPM that he had scored the most points under the federal application-rating system.

Then things took a strange turn. The museum personnel manager called OPM and said the establishment preferred somebody else—a non-veteran. It wasn't that Minnick was unqualified. The personnel manager simply wanted the other applicant.

Just like that, Minnick was out, and another candidate was in.

What John Minnick experienced is a direct violation of veterans-preference statutes that affects thousands of veterans each year. The blunt truth is that veterans-preference laws are regularly ignored or circumvented by federal hiring managers (some of whom will go so far as to reject entire lists of candidates simply because a veteran's name appears on that list). Worse, there is little a veteran can do to redress the wrong. For example, when Minnick complained about the incident, he was told that the personnel manager at the museum was new, and that an inexperienced OPM staff member had erred. And that was that. Excuses, but no job.

Years ago, John Minnick's story might have had a different ending. That's because years ago, veterans preference in federal employment was taken far more seriously. The laws first took life as part of the GI Bill, and were based on a solid rationale: Military service interrupts an individual's normal career progress. To level the playing field, the government developed a point system. Five points were awarded for wartime service (or more recently, for having served in a war zone), 10 points if the veteran had a service-connected disability. The points would be added to any federal employment exam with a score of 70 or more. And that is how things generally worked—until 1978.

That year, President Carter's Reorganization Plans abolished the Civil Service Commission (CSC), the governing body that heard and ruled on veterans-preference appeals. The CSC was replaced by the Merit System Protection Board (MSPB), and the United States Code was rewritten so that "hearings and appeals with respect to veterans preference" became "hearings and appeals with respect to examination ratings." A subtle change, perhaps, but it is now clear that OPM and MSPB no longer interpret the law in a manner consistent with its meaning and spirit prior to 1978.

According to OPM figures, some 615,080 non-postal-employee veterans were working for the federal government at the end of FY91. This was down by 138,000 from FY87, an 18.3 percent drop OPM attributed to the aging veteran population. By FY94, the figure had dropped to 560,028, a number that includes the 12,610 veterans newly hired the same year, according to OPM. All told, both the number of veterans currently in federal employment and the number being brought in are shrinking.

And yet, since 1991, expeditionary medals—the current basis for granting preference to non-disabled veterans—have been awarded to about 1 million GI veterans of the Gulf War, Somalia and

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Haiti. With that many "new" veterans qualified for preference in federal hiring, plus those from the Vietnam era seeking a mid-life career change, the number of veterans in federal jobs should be going up, not down.

In fairness, the federal government remains the nation's largest employer of disabled veterans; overall, about 20.7 percent of all federal employees outside of the postal system are veterans. This sounds like an impressive percentage until the numbers are compared to data from when CSC was still intact. In 1975, *half* of all federal employees—1.35 million workers—were veterans.

Officially, the government tends to deny that much is amiss. During a recent meeting on the issue, OPM director James King said his department fully supported veterans preference. Richard Weidman of the Veterans Economic Action Coalition remains skeptical. "That's just so much smoke," said Weidman, who contends that blatant violations of veterans preference laws take place regularly. "What OPM does not seem to understand is that veterans preference is the law," said Weidman. "It's not something they can ignore because it is inconvenient. Moreover, it is an earned right. It was not granted to them because of accident of birth of origin, skin color or gender."

The growing anti-veteran bias is clearly visible once you learn to decode the government's often-confusing memos and reports. For example, in a report on federal hiring submitted to Vice President Al Gore, the Merit System Protection Board (MSPB) stated, "The interaction of two staffing requirements embedded in Federal personnel law—veterans preference and the 'Rule of Three'—is widely viewed as an impediment to good hiring practices." What this means in English is that the top three or more candidates for a government job (based on points scored) are forwarded to the hiring manager for consideration; the so-called "impediment to good hiring" is that if one of the three is a veteran, the manager is supposed to give preference to that individual. Indeed, later in its report, the MSPB proposes legislation to undercut or abolish the Rule of Three. Such a step would formalize the contempt for veterans preference now practiced informally by many federal hiring managers.

Government managers justify their actions on the grounds of "improving the federal work force." They say they want the flexibility to hire a non-veteran applicant—for example, a recent college graduate—who scored higher on the exam when one deducts the bonus points awarded to the veteran simply for being a veteran.

However, under existing law, a manager already has the option of rejecting the entire list and requesting a new one. Taking advantage of this loophole is a common practice, according to Jim Hubbard, director of the Legion's Economic Division. Hubbard says lists may be rejected several times until the manager finds the "right" person. The GAO confirms that about 71 percent of applicant lists containing a veteran at the top are returned as a result of "candidates lacking desired qualifications." Tellingly, when no veteran's name appears on the list, 51 percent are returned.

Compounding the bias against veterans, according to Preston Taylor, director of the Department of Labor's Veterans Employment and Training Services (VETS), is the fact that the federal government is undergoing a massive reduction-in-force (RIF). By law, during an RIF, a veteran has "bumping rights," which simply means he or she can transfer into another position of the same level and "bump" a non-veteran or an employee with less tenure. Because veterans preference (technically) gives veterans such statutory protections during RIFs, other federal employees see them as a threat. All of which leaves non-veteran federal personnel feeling "angry and scared," says Taylor.

But there is a subtler reason why veterans are often shunted aside in favor of others, at least by civilian government contractors subject to federally mandated hiring policies: fear of discrimination cases brought by minorities. A person protected by Equal Employment Opportunity (EEO) laws who

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[more]

is discriminated against can sue and collect damages. Faced with the choice of a possible reprimand from OPM (which rarely happens anyway) or the very real threat of legal action and monetary settlement with those protected under EEO, contract employers routinely reject veteran applicants in favor of women and minorities, says the Veterans Economic Action Coalition (VEAC).

Interestingly, VEAC, a veterans-preference advocacy organization, cites a handful of suits that tried to apply EEO guidelines in veterans-preference cases, without success. It seems veterans are not included in the classes protected from discrimination under federal civil rights laws.

Unfortunately, even when the veteran lands the job, that doesn't always end the problem. The grim truth is that the job protection that once existed for veterans is rapidly being eroded.

Consider what has happened in the U.S. Postal Service. Some 278,000 veterans were employed in 1991 by the postal system, the nation's largest veteran employer. In 1994, newly appointed Postmaster General Marvin Runyon, under orders to downsize the massive USPS, hit upon a cunning plan. Knowing that he could not undertake an actual RIF without running afoul of veterans-preference statutes, Runyon instead shuffled his people around, moving former managers into low-ranking positions where they were supervised by individuals of lesser grade and tenure. Coupled with this was a freeze on all raises and cost of living adjustments for the former managers until the pay of the lower-paid supervisors eventually rose to meet the former managers' incomes through annual COLAs—a process that could take many years. In this way, the USPS would save millions by not having to pay salary increases or COLAs.

The affected employees, veteran and non-veteran alike, appealed to the MSPB, which agreed that the demotions did in fact constitute an RIF. Runyon wanted to appeal the decision, but fortunately for postal employees, President Clinton stepped in and told him to return them to their former positions.

Still, Runyon had a trump card to play. He abolished some positions on paper, then renamed them and gave them revised duties. Thus, when veterans demanded their old jobs back, Runyon was able to tell some of them truthfully—if unfairly—"That position no longer exists."

In an interesting footnote to the postal caper, Joseph J. Mahon Jr., OPM's Vice President of Labor Relations, wrote that among other things, Runyon's RIF was "too likely to have an adverse effect on minorities and women in the work force." By law and regulation, the only people whose jobs are protected during an RIF are veterans. Yet somehow, affirmative action became the larger consideration over veterans preference, once more revealing the government's true priorities.

In document after document, whether from the USPS or other government agencies, the overriding concern seems to be minority body count: *Do we have enough blacks, Hispanics and women in our workplace?* Sadly, where veterans are concerned, the question too often seems to be, *Can we think up another loophole to avoid veterans preference?*

Take the case of John L. Davis, a GS-15 civilian employee with the Army Corps of Engineers. A Korean veteran, Davis had worked for the government for 40 years. In March 1993, he was notified that his position would be eliminated as part of an RIF. According to Davis, there were as many as six positions at the GS-15 level within his department that he should have been able to bump to. His application to these positions was denied because, according to the Civilian Personnel Officer, he was unqualified. He was offered a lower-paying job in another government office, which he ultimately was forced to accept.

He appealed the decision to the MSPB. Though he acknowledged that "day-to-day administrative management of an office" was the only qualification he lacked for the position, he reminded the board he had similar experience at a lower pay grade. (In any case, federal managers have conceded in court that few people step into these managerial slots with every criterion fully met.)

Davis argued that he was denied his right to bump due to office politics and personal animosity. He supplied witnesses who testified that after he told another manager he intended to bump for the job in the event of an RIF, the manager complained to the director. Court records also showed that Review Board personnel intended to "teach Davis a lesson." Those same records contained statements that "he ascended fast, so he could descend fast," and that there were "political consequences" to Davis' actions.

Administrative Judge William L. Boulden wrote, "I find that [Davis] has established that [two Review Board members] were motivated by personal animus with regard to the appellant's rights under the RIF, and thus, the agency's determination of those rights could, under the circumstances, have been based on prohibited personnel practices."

A great victory for Davis? Not quite. Boulden wound up *ruling against* him, basing his decision on the dubious argument that Davis lacked managerial experience in the higher pay grade. And there was nothing Davis could do about it. (Nor does the injustice end there, apparently: Susan Odom, a co-worker and one of the people who testified on Davis' behalf, claims that the Department of the Army is now retaliating against her and her husband.)

The State Department has concocted yet another method to ensure that "favored" non-veterans are retained within the government. Here the work force is divided into three sections, or "cones": the top-ranking 25 percent, the middle-ranked 50 percent, and the lowest-ranked 25 percent. Each cone is treated as a separate entity. This means the veterans in the highest cone enjoy full preference and RIF protection—but it also means the *non*-veterans in the top level have preference and protection from veterans in the two lower cones.

Thus, as so often happens, the government has applied veterans-preference rules in an uneven, be-thankful-for-small-favors manner. And still, as Ray Smith, chairman of the Legion's Economic Commission, puts it, "you can count on some manager or director figuring out some way to sidestep the rules."

The search for silver linings in all this leads mostly to a handful of individuals waging their own personal war on behalf of veterans. For instance, PUFL Legionnaire Robert Donahue, a Local Veterans Employment Representative in Charles City, Iowa, received The American Legion National Outstanding Employment Service Officer Award for work placement, training and schooling of veterans. Donahue, a member of Post 278 in Osage, Iowa, found ways to get jobs for veterans in an area plagued by low employment.

Another "point of light" shines within the Department of New York, where Rick Weidman of the Veterans Economic Action Coalition is also the department's veterans employment chairman. According to Department Adjutant Richard Pedro, Weidman and others have begun an aggressive effort to train, counsel and find employment for New York veterans. Other Legion Departments—notably South Carolina, Wisconsin and Utah—are also actively involved in finding veterans work in the private sector.

But admirable as these efforts may be, they do little to tip the scales of injustice that played havoc with the likes of John Minnick, John Davis and many thousands of other veterans—men and women who made the mistake of believing that veterans-preference laws actually meant what they said. □

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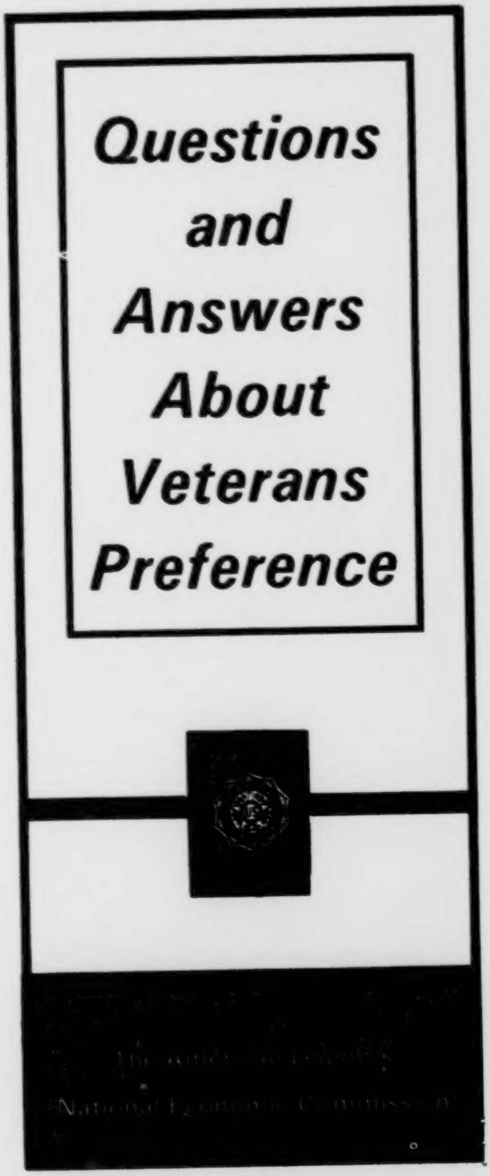

Questions and Answers About Veterans Preference

The American Legion

National Economic Commission

INTRODUCTION

One of the most misunderstood of all veterans' benefits is veterans' preference. As a result, veterans often have questions like these:

- Who is eligible for veterans' preference?
- What are noncompetitive appointments?
- When a reduction in force occurs, will veterans' preference protect the preference eligible?
- Where can further information on Federal employment opportunities for preference eligibles be obtained?

This publication will attempt to answer these and other questions you may have about this important veterans' benefit.

HISTORY

Throughout our history, America's war veterans have usually received some type of recognition for their military service. In the beginning this recognition was informal and varied from one war to the next.

In 1865 Congress passed legislation that formally established veterans' preference in Federal employment. This legislation gave honorably discharged veterans with service-connected disabilities preference in the Federal hiring process. Over the next few decades a variety of laws, executive orders, legal opinions and administrative rules expanded and improved on the limited veterans' preference benefits granted in 1865.

When The American Legion was formed in 1919, one of its first goals was to convert the patchwork of administrative and executive orders concerning veterans' preference into one national policy that would be protected by law. The culmination of the Legion's efforts came 25 years later when President Roosevelt signed the Veterans' Preference Act of 1944 into law. That law, together with its amendments, continues to be this country's basis for granting veterans' preference in Federal employment. Veterans' preference helps veterans in competitive examinations, hiring, and reductions-in-force. Federal agencies are responsible for following preference for their job applicants and employees. The Office of Personnel Management is responsible for applying preference in its competitive examinations and for overseeing agencies' observance of preference.

WHO IS ELIGIBLE FOR VETERANS' PREFERENCE?

Many people believe that anyone who served in the military is eligible for veterans' preference, or that only those who served in the armed forces are eligible for veterans' preference in Federal hiring. Neither is quite true. Therefore, we will refer to those who ***are*** eligible as **preference eligibles**.

There are two classes of preference. The first is five-point preference, which is given to honorably discharged veterans who served on active duty in the armed forces of the United States during a declared war, certain times specified in law, or a military operation for which they were awarded campaign or expeditionary medals. The second is ten-point preference, given to disabled veterans who served on active duty in the armed forces at any time, were honorably discharged, and meet certain criteria. Other preference eligibles include wives or husbands of disabled veterans, widows or widowers of veterans, and certain mothers of disabled or deceased veterans.

Specific questions regarding preference eligibility should be referred to the nearest OPM Federal Employment Information Center (FEIC). The address and telephone number of that center can be found in your local phone directory's government listings under "United States Government — Employment."

ARE MILITARY RETIREES CONSIDERED PREFERENCE ELIGIBLES?

As of October 1, 1980, military retirees are no longer considered preference eligibles unless they are service-connected disabled or retired below the rank of Major or its equivalent.

Military retirees may be subject to a pay cap limitation or to a restriction on their retirement pay. Furthermore, military retirees are restricted from applying for positions with the Department of Defense (DoD) unless they have either been retired for more than 180 days or have received a special waiver from DoD. This 180-day restriction does not apply to DoD positions for which OPM has increased the rates of pay to overcome staffing shortages.

WHAT ARE NON-COMPETITIVE APPOINTMENTS?

Federal agencies have the special option of hiring certain qualified veterans through two non-competitive programs. These are the **Veterans' Readjustment Appointment (VRA)** and **the 30 Percent (or more) Compensably Disabled** appointment authorities. The appointments are called noncompetive because, unlike OPM's public examinations, competition with the general public is not required.

Veterans are eligible for VRA appointment if they served for a period of more than 180 days active duty, all or part of which occurred after August 4, 1964, and have other than a dishonorable discharge.

The 180 days active duty requirement does not apply to (1) veterans separated from active duty for service-connected disability, or (2) reserve and guard members who served on active duty under 10 U.S.C. 672 a, d, or g, 673 or 673b, during a period fo war, such as the Persian Gulf War, or in a military operation for which they were awarded campaign or expeditionary medals.

Veterans do not have to qualify for preference to receive a VRA appointment.

Following 2 years of satisfactory service under a VRA appointment, a veteran receives a career or career conditional appointment to the competitive service.

Under the 30 Percent Compensably Disabled program, a veteran may be given a noncompetitive appointment provided that person meets the agency's qualification standards. This appointment may lead to conversion to career or career conditional employment. An appointee serving under the temporary appointment, which is not limited to 60 days or less, may, at the option of his/her agency, be converted non-competitively to a career or career-conditional appointment at any time. Further information on these two programs can be obtained from either the personnel office of any Federal agency or any FEIC.

Additionally, disabled veterans participating in the vocational rehabilitation programs of the Department of Veterans Affairs (VA) may train in Federal agencies and be noncompetitively appointed to the position or class of positions for which they were trained, by any agency having a suitable vacancy. Thus, the veteran is a beneficiary of the VA and not a Federal employee during training. However, the disabled veteran who completes a course of training may be appointed noncompetitively to the position for which he or she was trained. This is known as the **Non-Paid Work Experience** program. For more information contact either a VA Service Officer or the Vocational Rehabilitation Service at the nearest VA facility.

HOW ARE FEDERAL VACANCIES ADVERTISED?

Federal agencies advertise their vacancies through a publication entitled the ***Federal Job Opportunities Listing (FJOL)***. This publication lists jobs alphabetically and contains information such as the job's location, its pay scale, the opening and closing dates for application, and the number of vacancies that exist for that position. Often these listings will also include remarks about a particular job or will direct the reader to where additional information or forms for the position can be obtained.

Copies of the local ***FJOL*** are available at Job Service offices and FEICs. The ***FJOL*** can also be received by electronic transmission if the applicant has access to a personal computer with a modem, call 912-757-3100.

U.S. Postal Service examinations are announced by that agency. Contact your local post office or your nearest Job Service office for further information on employment opportunities in the Postal Service.

Another excellent source of information on Federal jobs is ***Federal Career Opportunities***, published privately every two weeks, and available at many main libraries. To obtain a subscription to this publication, contact the Federal Research Service, P. O. Box 1059, Vienna, VA 22183, phone 1-800-822-JOBS.

HOW ARE CANDIDATES FOR FEDERAL EMPLOYMENT SELECTED?

The Federal Civil Service system is composed of three separate and distinct services: the competitive service, the excepted service, and the senior executive service. Veteran preference is considered in appointments to the first two.

The major differences between the competitive and excepted services are in the areas of appointment procedures and job protections. In the competitive service, appointment procedures, merit promotion and qualification requirements are prescribed either by law or by OPM and apply to competitive service jobs in agencies. In the excepted service, only basic requirements are prescribed by law or regulation. Each agency develops specific requirements and procedures for its own jobs. Some jobs in the excepted service are filled through political appointments.

The five or ten extra points added to the preference eligible's basic rating cause his name to stand higher on a Civil Service list of eligibles who qualified in a public competitive examination. However, the extra points do **not** guarantee that the preference eligible will be given a job. Veteran preference simply means that preference eligibles may receive earlier consideration for appointment than they would without preference.

By law, selections must be made from among the top three available candidates on competitive Civil Service lists. Selecting officials may not pass over preference eligibles and appoint a non-preference eligible lower on the list unless their reasons for wanting to pass over the preference eligible are considered sufficient by the examining office.

Veteran preference also applies to nonpermanent appointments made to competitive service positions through individual agency hiring systems. Agencies using these procedures may rank and consider eligible applicants in the same way as on competitive civil service lists, or may consider them for appointment in the following priority: (1) persons entitled to 10 points who have a compensable service-connected disability of 10 percent or more (except for professional and scientific positions in grades GS-9 and above), (2) others entitled to 10 point and 5 point preference, and (3) all other qualified applicants.

Veteran preference also applies to positions in the excepted service. However, just as each agency sets its own appointment procedures, each excepted agency develops its own procedures to make sure legal requirements on the application of preference are met.

HOW ARE FEDERAL VACANCIES FILLED?

When a competitive service vacancy occurs in a Federal agency, the appointing officer may fill the job by promoting or reassigning a current employee, by reemploying a former employee, by using a special noncompetitive hiring authority, or by making a new appointment from a list (register) of eligibles who have qualified in a public competitive examination by passing a written test or showing they have the required work experience and education.

When an agency asks for candidates to consider from the list of eligibles, the examining office sends the names and SF-171s of the top three applicants to the agency. It may be necessary for the hiring official to conduct personal interviews. Since the SF-171 is one of the first things a prospective employer sees, it is imperative that it be well written and sell the applicant and his/her skills.

WHEN A RIF OCCURS, IS THE PREFERENCE ELIGIBLE PROTECTED?

Generally, preference eligibles have preference in examinations, appointments and retention. The one exception to this are some preference eligibles who are also retired members of the Armed Forces. For more information on which military retirees receive preference in reduction-in-force (RIF) situations, contact the nearest FEIC.

In a RIF, each employee is in direct competition with all other employees engaged in similar work, in the same pay grade, and serving under similar conditions. Among competing employees, the order of separation is determined by type of appointment, veterans' preference, length of service, and performance ratings.

WHERE CAN PREFERENCE ELIGIBLES GET FURTHER INFORMATION ON FEDERAL EMPLOYMENT OPPORTUNITIES?

Preference eligibles who are interested in working for the Federal government should contact the personnel office of the agency they would like to work for or the FEIC nearest the location where they would like to work. FEICs conduct job testing and can provide the preference eligible with information on employment opportunities in their particular area as well as any forms that may be needed to apply for specific jobs.

WHAT IS AN SF-171?

An SF-171 (Standard Form #171) is the Federal government's official application form for employment. This form has three essential uses:

1. To achieve the highest possible rating from the hiring agency.
2. To apply for specific jobs at Federal agencies.
3. To secure promotions and advancement in Federal employment.

If you are applying for a specific job, contact the personnel office of the hiring agency and ask for a copy of the job description. This will help you to tailor your SF-171 to that job and to emphasize the skills and experience you have that are applicable to the job in question. Currently there are several publications that feature information on how to fill out an SF-171. These are available through your local library or bookstores.

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Statement

of

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and
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before the

Subcommittee
on
Education, Employment, Training, and Housing
of the
Committee on Veterans Affairs
United States House of Representatives

Memorial Day
May 30. 1996

Mr. Chairman, thank you for the opportunity to appear here today to present our views and what we hope will be helpful information on the subject of *veterans' preference*, particularly in regard to reductions in force in the agencies of the Federal government. We are grateful to you, your distinguished colleagues on both sides of the aisle, and to your staff for the leadership you have shown on the important, indeed central issue of *veterans' preference*.

Perhaps any discussion of any aspect of *veterans' preference* should begin with a reiteration of why this issue is so important to veterans and other concerned citizens, including those who may never apply for a position with the Federal government. We believe the issue of *veterans' preference* is so essential for several reasons.

First, *veterans' preference* in hiring, promotion, and retention of the Federal workforce is the law. If there are individuals either within or outside of the Federal bureaucracy who do not like the **Veterans Preference Act of 1944** (as amended), then they should seek to eliminate the laws that accord *veterans' preference* to certain veterans of military service to the United States of America as well as certain select other individual citizens. That is the essence of our Constitutional democracy. The law of the land should be obeyed.

If it is found that the law is not being obeyed, then the Congress and the President should take all necessary steps to ensure that the law is enforced, including the institution of sanctions. It should not be possible for Federal officials and mangers to systematically flaunt the law with impunity. The much discussed "voter anger"is in large measure related to a pervasive belief that Federal entities all too often act in an extralegal manner and arrogate power for purposes not prescribed by the people through their elected representatives. If we cannot trust those same bureaucracies to perform the relatively straightforward function of securing their workforce in a lawful manner, how can we trust those same agencies to properly and legally perform more complicated tasks?

Second, it frankly matters who is in the Federal workforce. The **New York State Council of Veterans Organizations *Legislative Representatives*** recently determined that less than half of the workforce in the adjudications sections at the Regional Office of the United States Department of Veterans Affairs in Buffalo and New York City are veterans. This means, for example, that adjudicators who never even went through basic training will be making judgements, for example on what is a valid "stressor" in a combat zone for purposes of a Post Traumatic Stress Disorder pending claim. We believe that this is patently absurd, given the relatively large pool of highly qualified disabled veterans.

Respect for this system is even further eroded when it becomes apparent that the VA

Regional Office in Buffalo used the so-called"Outstanding Scholar"program and other "special hiring authorities" in order to circumvent hiring veterans.

VEA believes that the Veterans Health Administration of the United States Department of Veterans Affairs would be much more sensitive to the needs of their veteran patients if more of the workforce were themselves veterans, particularly at the supervisory levels. Virtually none of the VA Medical Center Directors nor the new Network Directors are veterans, much less *veterans' preference eligibles*. In New York, the percentage of veterans in the workforce at the twelve Hospitals ranges from 20% at Buffalo VAMC to 37% at Batavia.

Most of the veterans who are employed by these facilities are in blue collar or other relatively low level jobs. Is it really any wonder that there is a problem in getting these facilities to abide by their own regulations and take a complete military history for every patient admitted for service, in order to properly diagnose and treat veterans? Seen from this perspective, should anyone be surprised that many Vietnam and younger veterans feel that there is often a patronizing attitude exhibited by a significant portion of the staff?

Given the scant number of veterans in key positions, as well as the fact that this low number of veterans in the workforce was rather obviously"achieved"by extra legal means and/or systematically applying "loopholes" over a period of almost two decades, it is remarkable that the system is even reasonably responsive or sensitive to the *special needs* of veterans, particularly disabled veterans.

Since there is no likelihood of a large number of positions to be filled in the near future, given the continued relative diminishment of appropriations for the Veterans Health care system, the key issue for the largest number of veterans is *veterans' preference* rights in any and all reductions in force and/or "restructuring" or other significant personnel shifts.

Mr. Chairman, before we concentrate on the specific focus of this hearing today, "Reductions in force" we would like to note that this Committee and this Congress have an historic opportunity to restore the proper meaning and force to the term "*veterans' preference eligible.*"

Therefore we draw your attention to the Appendix I to this statement, which outlines a ten point program that would reinvent the term *veterans' preference* with meaning. The steps needed to protect the rights of veterans in a reduction in force must be accompanied by other steps to enforce all of the central tenets of the *veterans' preference* laws. These are ten simple steps that the Congress and the Executive branch can, and should, take to ensure that the rule of law prevails over bureaucratic predilections.

May 30 will always be Memorial Day to us. This day should be invested with the full weight of the responsibility, honor, and privilege of reflecting on those who sacrificed that we might enjoy our freedoms today in this great Nation. Each American has a covenant with those who gave their lives in wars past to do his or her best to defend the Constitution and the Nation in the future. In the spirit of honoring the dead by helping the living, and of keeping that covenant with the young Americans in uniform today and in the future, we are honored to be here.

REDUCTIONS IN FORCE

Currently the biggest issue facing *veterans' preference eligible* employees in Federal service are the actions being taken to "downsize" the Federal government. It matters not whether an agency calls it downsizing or restructuring, a Reduction-In- Force by any other name is still a Reduction-In-Force.

The purpose of a RIF was best described by The Court of Appeals for the Federal Circuit.[1] Judge Bissell provided:[2]

> The RIF regulations promulgated by OPM pursuant to it's legislative mandate in 5 U.S.C. [§] 3502 provide the administrative process through which the government eliminates jobs and deals with the employees who formerly occupied the abolished positions. **Unlike adverse actions, RIF's are not aimed at removing particular individuals** [emphasis added]; rather, they are directed solely at positions. After the Agency has decided to eliminate positions as a matter of it's independent managerial discretion, the identification of affected employees is governed by OPM regulations.

In Horn v. MSPB, 684 F.2d 155, n.2 (D.C. Cir 1982), the Court provided a succinct definition of the RIF process:[3]

> Described briefly, a RIF works as follows: When a "reorganization," "lack of work" budget cutback or the like requires the release of some personnel, an agency must announce that fact together with a RIF plan. Pursuant to the plan, an administrative area must be designated from which a certain number of employees will be released and within which the employees will compete

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[1] Peter Broida, A Guide To Merit Systems Protection Board Law and Practice, 1995 Edition 1519.

[2] Grier v. DHHS, 750 F. 2d 944 (Fed. Cir. 1984).

[3] See Broida 1519.

to be retained. Retention is determined according to a variety of factors including *veterans' preference* and seniority. The "competition" is conducted through a "retention register" on which employees are listed according to their "competitive level" (defining comparability), seniority, and so forth. Once the individuals who are to be released are identified, "reassignment" rights come into play. These rights permit certain individuals under certain circumstances to "bump" (displace) others or to "retreat" to previous jobs. The intricacies of the procedure are remarkable, too remarkable to describe here in detail. 5 CFR 351 (1982); see generally Note, Reduction In Force: A guide to the uninitiated, 44 Geo. Wash. L. Rev. 642 (1976).

In a perfect world Federal agencies would follow the mechanics of a RIF without manipulation, obfuscation or circumvention. This is not a perfect world. In order to understand how Federal agencies manipulate RIF laws, rules and regulations an explanation of the mechanics of a RIF are necessary. Title 5 U.S.C. § 3502 (1993) provides:

> (a) The Office of Personnel Management shall prescribe regulations for the release of competing employees in a reduction in force which gives due effect to -
>
> (1) tenure of employment;
> (2) military preference; subject to section 3501(a)(3) of this title;
> (3) length of service; and
> (4) efficiency or performance ratings. ...

"In its report Reduction in Force: The evolving Rules the Merit Systems Protection Board provided it's assessment of the RIF process:[4]

> ... In organizing their work forces for RIF purposes, agencies first establish competitive areas based on agency organization and location, and group employees by those competitive areas [1].
>
> [1] A competitive area may be defined as all or part of an agency. If an agency has more than one competitive area, the boundaries are defined solely in terms of organizational units and geographic locations.
>
> Within the competitive areas, positions are grouped by competitive levels [2].

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[4] See Broida 1520-1521.

[2] A competitive level is established by grouping together jobs in the same grade and classification series that are so similar in work requirements that employees could move from one to another without needing significant needing significant training and without disrupting the agency's work program.

Next, agencies determine employees' retention standing within the competitive levels by tenure of employment [3], veterans status, length of service, and performance. (Credit for performance is expressed as additional years of service.)

[3] There are three tenure groups for RIF purposes. In order of precedence they comprise: (1) career employees; (2) career-conditional employees and all employees serving probationary periods; and (3) employees serving under a variety of nonstatus, nontemporary appointment authorities such as those governing Temporary Appointment Pending Establishment of a Register, or indefinite appointments. [5]

A RIF can effect employees in any of four ways: (1) involuntary separation; (2) demotion; (3) furlough for more than 30 days; or (4) reassignment requiring displacement of another employee.

Employees can be reassigned to displace other employees of lower retention standing within the same competitive level. Employees also can "bump" other employees, at the same grade or at a lower grade, in another competitive level, provided the "bumped" employees have less tenure or less veterans preference. Additionally, employees can "retreat" to positions at the same or lower grade. . . ."

The best known example of the "Designer RIF" is the infamous United States Postal Service (USPS) "restructuring." While implementing the restructuring the USPS circulated question and answer "flyers" informed preference eligibles that they would not receive any "entitlements" (i.e. the benefit enjoyed by preference eligibles in the competitive service during a RIF).

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[5] Each Tenure Group is further divided into subgroups based upon military preference: (1) Subgroup AD is comprised of preference eligibles with a disability 30 % or more; (2) Subgroup A is comprised of preference eligibles not covered in subgroup AD; and (3) subgroup B includes each non-preference eligible employee.

In a declaration made by *Joseph J. Mahon, Jr.*, Vice President, Labor Relations offered by the United States Postal Service (USPS) as evidence in numerous MSPB appeals it states:

> (4) To fulfill the Postmaster's pledge to change the way the Postal Service does business and to reduce the layers and size of middle management, the Postal Service sought advice of the Office of Personnel Management and consulted with Postal Unions, management organizations, and customers.
>
> (5) The consensus which emerged from these contacts was that a reduction in force (RIF) should be used only as a last resort and that alternatives should be pursued. A RIF was seen as too disruptive to operations and the Postal Service's ability to provide consistent, reliable mail service to the American public; too complicated, expensive, and time-consuming, **too likely to have an adverse effect on minorities and women in the workforce**; [emphasis added] and too likely to produce harsh, arbitrary results in individual cases.
>
> (6)... whereas running a RIF would have resulted in laying off more recently hired workers, whose families would be devastated."

In the Statement of Lennox E. Gilmer, Associate National Legislative Director, Disabled American Veterans before the Subcommittee on Civil Service, Committee on Government Reform and Oversight on October 13, 1995 found that:

> A March 30, 1993 memorandum from Mary S. Elcano, Vice President, General Counsel, USPS, laid out a strategy for "Why Postal Service decided not to run a RIF." The purpose of the memo was to develop a strategy for the agency to defend it's failure to provide veterans' preference in RIF by calling the Agency actions a reorganization. In part, her memorandum states:
>
> It has also been found that women and minorities comprise a large portion of the non-veteran group and RIF procedures can affect those employees in a way that seriously impairs the affirmative action accomplishments of an organization.

These sentiments of course sound like reasonable considerations, however, "unlike adverse actions, RIF's are not aimed at removing particular individuals; rather, they are directed solely at positions." "OPM has issued regulations and guidance implementing its statutory mandate which, with respect to the Postal Service, afford retention preference and appeal rights to the Board only for preference eligible employees affected by RIF's. Postal Service employees who are preference eligible employees are covered under OPM's regulations at 5 C.F.R. part 351. ... These regulations are not applicable to non-preference eligible employees of the Postal Service."[6]

39 U.S.C. § 1005(a)(2) provides that:

> (a)(2) The provisions of title 5 relating to a preference eligible (as that term is defined under section 2108 (3) of such title) shall apply to an applicant for appointment and any officer or employee of the Postal Service in the same manner and under the same conditions as if the applicant, officer, or employee were subject to the competitive service under such title.

Based upon 39 U.S.C. § 1005(a)(2) only preference eligibles in the USPS are covered by OPM's regulations in 5 C.F.R. Part 351. Based upon the information cited above it appears that the USPS decision not to conduct a RIF was aimed specifically at preference eligibles. If an individual believed they had been discriminated against during the USPS restructuring based on gender or minority status they had a redress mechanism under 29 C.F.R. Part 1614. However, discrimination based upon a persons status as a preference eligible is not covered under 29 CFR Part 1614.

Further, **42 U.S.C. 2000e-11** provides:

> "Nothing contained in this subchapter shall [subchapter VI - Equal Employment Opportunity] be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preferences for veterans."

It would seem that the "Black letter Law" tends to establish that the USPS's decision not to engage in a RIF was based, at least in part, upon an improper motive. Further, it then granted an unwarranted preference to minorities, women and the recently hired at the expense of preference eligibles, the only employees covered by title 5 C.F.R. Part 351.

It is significant to note that the USPS consulted with OPM prior to implementing it's restructuring and that (1) the impact of women and minorities was even considered in the face of 39 U.S.C. § 1005 (a)(2) and 42 U.S.C. § 2000e-11; (2) OPM joined the USPS in its petition for review to the Board claiming they had no jurisdiction based on a "no harm--no appeal" principle[7]; (3) that the agency never developed a retention register upon which employee competition was determined; (4) many preference eligible employees were detailed to agency placement centers while other employees who may not have been preference eligibles, or have had the seniority, tenure or performance ratings yet were retained in the successor positions; and (5) preference eligible employees were not informed that the USPS was conducting a RIF as required by 5 CFR Part 351, they were told they had no right of appeal and when told they had no other options they accepted a "voluntary downgrade." Preference eligibles who accepted "voluntary downgrades"[8] who filed appeals after the Board held that the agency conducted a RIF had their cases dismissed because the Merit System Protection Board held they had no jurisdiction on "voluntary" actions.

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[6] Raymond v. United States Postal Service, 45 M.S.P.R. 16, 19 (1990).

[7] See Robinson v. USPS, 63 M.S.P.R. 307 (1994).

The USPS is not alone in it's endeavor to "manipulate" the law. The military services (Army, Navy, Airforce) and the Defense Logistics Agency employ 284,487 of the 560,028 veterans employed in the Competitive Service. This fact has not gone unnoticed. In 1990, GAO[9] found:

> "On May 11, 1990, the Assistant Secretary of Defense, Force Management and Personnel, required the military services to perform an impact analysis before a RIF to **assess and guard against any disproportionate impact on EEO groups** [emphasis added].

In it's testimony GAO has made comments to Congress that raises serious questions with regards to it's ability to be impartial and intellectually honest. In a 1993 statement[10] it provided:

> The other issue I want to mention is the downsizing of the Federal Workforce. Downsizing, rightsizing, reduction-in-force (RIF), what ever you call it, it's success depends on workforce planning. **Workforce planning permits an agency to examine the impact of various options for reducing the workforce and make alternative choices if certain impacts -- like loss of key expertise or disproportionate effects on women and**

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[8] See Cooley v. USPS, NY-0351-94-0535-I-1, Dequarto v. USPS, NY-0351-94-0462-I-1

[9] Defense Force Management The 1990 Reduction-In-Force at the Mare Island Naval Shipyard, GAO/NSIAD-91-306, August 1991, pg. 4.

[10] EEOC: Federal Affirmative Planning Responsibilities, GAO/T-GGD-94-20 (Oct 1993).

minorities are undesirable.

This statement is puzzling. Is GAO offering legal advice to agencies by telling them that it's ok to ignore the law and manipulate the workforce prior to the announcement of a RIF so that the impact will fall on preference eligibles and senior employees? If this is the case we suggest a serious inquiry into GAO's RIF planning.

A quick review of GAO's December 28, 1995, Draft RIF order found some of the language interesting. Chapter 4, section 2 provides:

> a. When a tenure group I or II employee with a performance appraisal average for the most recent year of 3.0 or higher (2.0 for employees in subgroup AD or A) is released from a job group, GAO will offer assignments to an available position under provisions of this chapter, rather than furlough or separate the employee.

However, GAO's "zone of consideration" defines the boundaries within which employees compete for retention in a RIF. These zones can be drawn very narrowly defined to include certain functions or groups of people.

Section 4 of Chapter 4 provides:

> b. An employee with an overall 3- year performance appraisal average below 3.0 (see chapter 2, paragraph 5d) cannot bump into a position occupied by an employee with an overall average of 3.0 or higher.

Section 5, of Chapter 4 provides:

> b. An employee with an overall performance appraisal average below 3.0 (see chapter 2, paragraph 5d) cannot retreat to a position occupied by an employee with an overall average of 3.0 or higher.

Under their rules GAO can target certain functions or groups of people (perhaps preference eligibles) and eliminate a preference eligibles ability to bump or retreat if they have an overall performance appraisal average below 3.0. These procedures would appear to be in conflict with 5 U.S.C. § 3502 (b) and (c) (1993) which provides that a 30 % or more disabled (AD) and an employee entitled to retention preference (A) whose performance rating has not been rated unacceptable (1) is entitled to be retained in preference to other competing employees.

In yet another GAO report we found:[11]

> In connection with separations, about two months ago we issued a report on the September 1990 reduction-in-force at the Mare Island Naval Shipyard. [See fn 6] From our work, it appeared that the reduction-in-force had a disproportionate impact on women and blacks. Women could not match the veterans' preference and seniority of male employees. ... The shipyard did not recognize that the reduction-in-force would have a disproportionate impact until after layoff notices were issued, at which time the shipyard took steps to retain or rehire some women and blacks who had lost their jobs. ... **We raise this matter today to recognize that the effects of reduction-in-force on women and minorities will remain an important issue as the Department of Defense goes through it's "downsizing" actions and as civilian agencies experience similar actions [emphasis added]. ...**

First, 42 U.S.C. § 2000e-2 (1993) provides:

> (h) Seniority or merit system; ... Notwithstanding any other provision of this subchapter [subchapter VI Equal Employment Opportunities], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system ...

The significant factors in a RIF are seniority (length of service), merit (efficiency or performance rating) and veterans preference. The Law spells out quite clearly that: (1) a bona fide seniority or merit system is not discriminatory; and (2) that nothing in subchapter-VI "Equal Employment Opportunities" shall be construed to repeal or modify any Federal law granting a preference for veterans. Is GAO saying that the RIF laws and regulations are not a bona fide seniority or merit system or that agencies should repeal or modify federal laws granting preference to veterans or both?

Veterans Economic Action has been speaking with preference eligibles who are employed by the Department of the Army's Watervliet Arsenal in New York, the Defense Logistics Agency in Garden City, New York and the United States Information Agency.

A pattern appears to be developing in Defense related agencies that is quite disturbing. It is common knowledge that Defense agencies have been subject to continual "downsizing" since the early 1990's. Based on conversations with preference eligible employees at both the Department of the Army's, Watervliet Arsenal in NY and at DCMC-LI in Garden City, NY it seems that individuals who may be vulnerable to RIF procedure are promoted, transferred to safe positions or sent on details to gain experience for specific positions prior to the announcement of a RIF. We believe that this disturbing pattern should be investigated and that a freeze should be imposed on all personnel actions for two years prior to a RIF.

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[11] Federal Affirmative Employment Status of Women and Minority Representation in the Federal Workforce, GAO/T-GGD-92-2 (October 1991).

We are including a statement by the Foreign Service Veterans Association to our testimony as appendix II. The question they ask is whether the Congress intended that 5 U.S.C. §§ 3501-3502 apply to preference eligibles in the Foreign Service in the same manner and under the same conditions as preference eligibles in the competitive service.

VEA recently received a faxed page from Public Law 104-50. This page , more specifically Section 347 appears to require the FAA to develop new personnel management system which excludes the RIF provisions of title 5 U.S.C. §§ 3501-3504.

VEA and other Veterans Service Organizations have offerred testimony in the past that we believe shows that the front door leading to Federal employment for preference eligibles has been nailed shut. VEA is very concerned that those preference eligibles who have been lucky enough to find their way into the front (or side door) will now be rushed out the back door in increasing numbers even with the ostensible legal RIF protections. What will happen now, without any real protection? It is incumbent on the Congress to act swiftly and decisively to prevent this continued flaunting of the law by the bureaucratic entities.

It would seem that the intent of the "Black letter Law" is clear. However, in both the Competitive service and the excepted service key officials who have responsibility for hiring, promotion, and retention blatantly violate the law. Yet those same managers and officials face absolutely no consequences whatsoever!

The effects of the computer age are also being felt by *veterans preference eligibles* in the age of downsizing, but not in the way one might think (i.e., computers displacing workers who formerly performed a function manually).

Federal agencies are now able to run models using computer programs (RIF Whiz and others) to design the "politically correct" agency. They can manipulate and target different individuals and/or groups by simply running numerous scenarios through the program until the "correct" solution is arrived at. Although it is generally a bad idea for a legislative body to try to "micro manage" the Executive branch, the last seventeen years has amply demonstrated that Federal bureaucracies, if given ***any*** leeway to manipulate a *veterans' preference* statute, those bureaucracies will shamelessly flaunt the law.

the law.

As a the next step in the process of the Congress ascertaining what needs to be changed in the statutes governing the administration of *veterans' preference*, we suggest that you bring together a representative sample of Human Resource directors from Federal agencies, by subpoena if necessary. Put those individuals under oath to testify about the methods, means, and "tricks" they employ to "deal with" what they clearly consider to be the "problem of *veterans' preference eligibles*" in hiring, promotion, and (particularly) retention. These persons clearly have become the "experts" in how to deprive *veterans' preference eligibles* of their rights, largely through word of mouth and "tricks of the trade" passed on orally from one person to another. As these people clearly see nothing wrong with either violating the law or concealing it from the Congress for the last seventeen years, one would have to admit that this is a "*culture*" that both protects and promotes this behavior.

FEDERAL AGENCIES: A "CULTURAL REVOLUTION?"

"Every organization has a *culture*. That *culture* is a persistent, patterned way of thinking about the central tasks of and human relationships within an organization. Culture is to an organization what personality is to an individual. Like human culture generally, it is passed on from one generation to the next. It changes slowly, if at all."[12]

The *culture* of the Civil Service Commission, OPM and Human Resources offices of Federal Agencies began to change in the 1970s. It is no secret that during that time the United States of America was a nation divided against itself. The Vietnam War, the vilification of all things military (including the inability to separate the war from the warrior) and the rise of diverse organizations who used this division as an opportunity to gain greater economic opportunity at the expense of *preference eligibles*.

We have seen the number of *veterans' preference eligibles* employed in Federal non-Postal Executive Agencies fall from 1,350,000 in 1977 to 560,028 in 1994. These vacancies, were of course, filled by non-preference eligible employees. History has taught us that during its Cultural Revolution (1966-1969) China initiated a comprehensive reform movement to eliminate counterrevolutionary elements in the country's bureaucracies and cultural circles. This is not to say that Communists have taken over the bureaucracies but rather as a comparison of the cultural change that has impacted the way preference eligibles are treated by the bureaucracy.

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[12] James Q. Wilson, Bureaucracy What Government Agencies Do and Why they Do It, 91 (1989).

"... In 1938 Chester Barnard wrote about the "moral element" in organizations and the "moral factor" in leadership. By moral he did not mean merely obeying the law or following the rules, but 'the process of inculcating points of view, fundamental attitudes, loyalties, to the organization ... that will result in subordinating individual interest ... to the good of the cooperative whole.' Two decades later Philip Selznick likened the creation of "organizational character" to character formation in an individual: A viable organization is not merely a technical system of cooperation (any more than an individual is merely a mechanism processing food and sensations); it is an institution that has been "Infused with value" so that it displays a "distinctive competence" (or a distinctive incompetence!). An organization acquires a distinctive competence or sense of mission when it has not only answered the question 'What shall we do?' but also the question 'What shall we be?'"[13]

The Office of Personnel Management (OPM) is one agency that by either commission or omission has been unable or worse, unwilling to answer that question. Appendix III of a 1992 GAO report[14] provides a synopsis of 19 prior reports finding that (1) the newly created OPM was reluctant to acknowledge the extent of it's responsibilities for merit protection and had assigned a low priority to merit protection functions; (2) the majority of these reports found major problems with OPM's leadership and oversight with agency Personnel Management Evaluation (PME) programs; and (3) that OPM was ranked as one of the least effective agencies in government by federal managers.

CONCLUSION

One simple fact remains. The United States of America, by the President as Commander in Chief of the Armed Forces, has been ordering a minute portion of America's men and women into harms way for over two hundred years. Under the last four Presidents America's Armed Forces have been committed to numerous operations in the name of the American people. To name a few of these operations there were the Iranian hostages rescue attempt, Grenada, Lebanon, Panama, Desert Storm/Desert Shield, Somalia, and Bosnia.

During this same time frame the last four Presidents have turned a blind eye to those bureaucrats in the Executive Branch who have substituted their own agenda and bias against preference eligibles for the laws of the land. In many instances we believe that Administrative Agencies and the Courts have resorted to Judicial Activism to defeat the "Black letter Law" of the "Veterans Preference Statutes" passed by Congress.

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[13] Ibid. 91-92.

[14] Federal Personnel Management OPM Reliance On Agency Oversight of Personnel System Not Fully Justified, GAO/GGD-93-24 (December 1992).

"When Robert Katzman interviewed senior FTC officials in 1987-1988, they were unanimous in saying that congressional policy directives (as opposed to procedural haggling over budget levels and the closing of regional offices) were unusual. One remarked that except for "bothersome congressional hearings" that "went nowhere," "we can do just about anything- or not do just about anything." Another said, "I cannot think of a single enforcement action dictated by Congress since I've been here." When a congressional committee investigated the FTC it was regarded by the agency's leaders as being largely for show: After he [the committee chairman] satisfies his constituents ... things go on exactly as before." (Robert Katzman, interview notes, July 31, 1988.)[15]

The Constitution has provided a mechanism to elect the President, Congress and the Senate. However, the Constitution has not provided a mechanism for electing or defeating a Bureaucrat at the ballot box. There is no need for a crystal ball to see the anger and frustration that is being experienced by Americans in general and her veterans in particular. Boiled down it comes down to one fundamental issue. The Constitution provided all legislative powers to the Congress and charged the President with faithfully executing the law.

Bureaucrats are only provided with those Legislative or Executive powers that are delegated to them by Congress or the President. It would seem that many bureaucrats have imposed their will as a substitute for the law, taken upon themselves far more power that delegated and appear answerable to no one.

Mr. Chairman, thank you again for this opportunity. We urge you to take all steps necessary to restore respect for all Federal laws, *veterans' preference* statutes included. If there must need be significant sanctions brought against those who would use the "tricks of the trade" to scoff at the law and our Constitutional process, then so be it.

We owe it to those who gave their last full measure of devotion to defending the Constitution and our Nation to do what is necessary.

We would be pleased to answer any questions you or your distinguished colleagues may have.

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[15] See fn 11, page 255.

VEA Appendix I

Veterans' Preference 10-Step Restoration Program

1. Keep the "Rule of Three."

2. (A) Eliminate ALL "Special Hiring Authorities." These are now used primarily to circumvent veterans and disabled veterans on the lists. ("ALL" includes "Veterans Readjustment Appointment" or "VRA" hiring authority, which has been so *mis*used and abused in the actual application as to be unrecognizable to the well-intentioned individuals in the Congress who created it.)

(B) As the alternative, those currently eligible for five points and ten points continue to be eligible for this *preference* mechanism, but now the lists would *have* to be used in every instance. In addition, VEA proposes that veterans who are rated for being 30% or greater service connected disabled be accorded fifteen points in the hiring process, after meeting the minimum qualifications.

3. Require each Federal agency or entity, and all Federal contractors, to list *ALL* job openings with the automated job bank of the state employment security agencies in such a way that the job will come up as a "match" when the DVOP, LVER, or other staff person does the automated "veterans' file search" that matches veterans with jobs for which they meet the minimum qualifications.

4. Require Federal agencies to allow any veterans' preference eligible to compete for any job for which he or she meets the minimum qualifications other than already being "inside" the agency. (This is the only way for veterans to begin to "catch up," given the discriminatory pattern of the last twenty years. This would do a great deal more for veterans than "VRA" ever did, because it would be a RIGHT that the hiring authorities could not abuse.)

5. Individual veterans need to have adequate notice of and access to a clear, independent, and "user friendly" redress mechanisms that can be utilized when a veteran believes that he or she has been denied a right under the "veteran preference statutes" in either the competitive or excepted service.

VEA(*Ten Points*, Page Two)

6. Federal managers, officials and employees should be subject to being fired, demoted or otherwise disciplined if they fail to adhere to and enforce veterans' preference or if they allow policies to develop that establish a pattern or practice of discrimination against veterans, especially disabled veterans, in the hiring, promotion, retention or appeals of such rights.

7. Require that all Federal Departments, Agencies or other entities in either the competitive service or the excepted service must be certified *each* year as in compliance with all "*veterans preference*" statutes. The reporting mechanism already established pursuant to 38 U.S.C. 4214 would be used and expanded to include the total number of veterans hired, the hiring authority (until such time as all are eliminated) used by the agency to hire the veteran, and the grade and positions that the veterans were hired for. Failure to comply with these requirements would result in the impoundment of funding for the agency until they complied with these requirements, or began making satisfactory progress on a suitable corrective action plan, and until the official(s) responsible for the failure to comply are relieved or otherwise appropriately disciplined.

8. Veterans who believe that their rights under the "veterans preference" statutes are violated would have the right to sue the agency and the responsible official(s). If it is determined that the responsible official(s) acted, or allowed others to act, with disregard for the "*veterans preference*" statutes, the responsible official(s) would lose the privilege of "*sovereign immunity*" and could be sued as an individual for damages.

VEA

(*Ten Points*, Page Three)

9. Require that the Merit System Protection Board (MSPB) begin to act immediately in such a way as to enforce all veterans' preference laws, and to publish all decisions that have bearing on veterans' preference in such a way that veterans and veterans' advocates can have access to such decisions, and all internal papers and memoranda, without cost. (Please note that MSPB has *never* found in favor of an individual in a straightforward case of violation of veterans' preference, insofar as we can ascertain.)

10. Take legislative action that would prevent Federal agencies and entities from establishing narrow "bands" for purposes of a Reduction-In-Force (RIF), that would require each Federal entity to take any and all such steps as would reduce the impact of any RIF on veterans' preference eligibles (particularly disabled veterans), and that would forbid any Federal entity to make any personnel shifts or "restructuring" actions in the two years preceding a RIF or during a RIF that takes into account any demographic factor of their workforce *except* "veterans' preference eligible" status.

Statement by the Foreign Service Veterans Association May 30, 1996

Section 181 of PL 103-236 (the Foreign Relations Authorization Act of 1994-1995) requires that the Secretary of State issue regulations for reductions in force (RIF) in the Foreign Service. This law amends section 611 of the Foreign Service Act of 1980 and specifies that due effect should be given to "military preference [i.e. veterans preference], subject to section (a) (3) of title 5" during the conduct of Foreign Service RIFS.

The legislative history shows that there was little discussion and no debate on this provision, which was offered as an amendment by Senator Helms on January 25, 1994. During hearings on the Act, Senator Helms said "...this amendment will give the Secretary of State the same authority over his employees that the Secretaries of every other agency or department has over his or her employees.....members of the Foreign Service should not be treated as a protected class of privileged individuals. They should be treated no differently than members of the Civil Service on this issue." The amendment was adopted as submitted by Senator Helms.

5 U.S.C. 3501 and 3502 (derived from the Veterans Preference Act of 1944) concerns retention preference during reductions in force in the executive branch. Section 3501(b): "except as otherwise provided by this subchapter and section 3504 of this title, this subchapter applies to each employee in or under an executive agency".

Section 3502 (a) (2) specifies that in a reduction in force due effect will be given to "military preference, subject to section 3501 (a) (3)".

It is of interest to note that the Foreign Service Authorization Act and 5 U.S.C. 3501(a) (2) use identical language regarding military preference, i.e., "Military preference, subject to section 3501 (a) (3)". (Section 3501 (a) (3) concerns the definition of preference eligible employees who are retired military.)

The code of federal regulations (5 CFR 351.201 et seq.) implements Title 5 and provides the rules and procedures to be followed regarding the application of veterans preference during RIFs. Section 351.202 specifies that these rules apply "to each civilian employee in the executive branch". Section 351.501 provides the detailed procedures regarding the order of retention for veterans during RIFs for the competitive service (i.e. Civil Service). Section 351.502 specifies that "Competing employees in the excepted service [i.e. Foreign Service et al] shall be classified on retention registers in a way that corresponds to that under section 351.501 for employees in the competitive service having similar tenure of employment, veterans preference and performance ratings...". We believe that this is absolutely unambiguous in requiring that the Foreign Service agencies adhere to section 351, Title 5.

Furthermore, it should be noted that Title 22, Chapter 18, which provides the authority for USIA to operate and to conduct a foreign information program, specifies as follows: "Section 1438 Veterans preference. No provision of this chapter shall be construed to modify or repeal the provision of sections 1302(b), (c), 2108, 3305(b), 3501 to 3504 [et al] of Title 5." (These are the relevant section of the US law which codify the Veterans Preference act of 1944.)

The Foreign Service agencies (State, USIA and AID) have written separate and different RIF regulations as required by the Foreign Relations Act of 1994-1995. (To date, only USIA's have been formally issued and approved by OPM). These regulations provide some limited preference to veterans. However, these are not uniform between the agencies and do not comply with the requirements of law in 5 U.S.C. 3502 and 5 CFR part 351.

The Foreign Service agencies are now in the process of conducting Foreign Service RIFs (USIA expects to RIF about 25 foreign service employees in the Summer of 1996; AID has announced a RIF of up to 200 FS employees in 1996). It is clear that, under the agencies' RIF regulations, which provide only a minimal "token" preference for veterans, some veterans and disabled veterans will be RIFFED this year.

The question at hand is whether the Congress and the Law clearly intend that veterans preference rules under 5 U.S.C. 3501-3502 apply to the Foreign Service in the same manner as the Civil Service. We think the law is clear on this matter. Certainly, Senator's Helms statement that Foreign Service employees "should be treated no differently than members of the Civil Service on this issue" is clear.

The Act (PL123-206) did not specify that the Foreign service RIFS be conducted in accordance with 5 U.S.C. 3501 and 3502. It only specified that the same exception to the veterans preference used in the Civil Service (i.e. concerning retired military under 3501(a)(3)) also be used in Foreign Service RIFs. It is clearly implied that the other provisions of 3501 and 3502 related to veterans preference for the Civil Service would also apply equally to the Foreign Service.

Congress did not specify this because it did not need to--5 U.S.C. 3501 (b) clearly states that these rules apply to all employees of the executive branch.

In the absence of action by the Congress, the Foreign Service agencies will RIF veterans in the months to come under regulations that do not afford the same preference as Civil Service veterans receive. The Foreign Service agencies have wrongly interpreted the intent of the Foreign Relations Act to mean that they could issue RIF regulations which disregard the requirements for veterans preference as required by 5 U.S.C. 3501 and 3502.

We ask that the Congress take action to clarify its intent so that there will be no misunderstanding by the Foreign Service agencies.

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A Not-For-Profit Veterans Service Organization Chartered by the United States Congress

STATEMENT OF

VIETNAM VETERANS OF AMERICA

Presented by

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Deputy Director,
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Before the
House Veterans Affairs' Committee

Subcommittee on
Education, Training, Employment and Housing

on the
Implementation of USERRA
and the
Enforcement of Veterans Preference

May 29, 1996

Introduction

Mr. Chairman and members of the Committee, Vietnam Veterans of America (VVA) appreciates the opportunity to present its views on the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the challenge of enforcing veterans preference.

Implementation of USERRA

Vietnam Veterans of America is strongly satisfied with the manner in which the Veterans Employment and Training Service (VETS) of the U.S. Department of Labor (DOL) is implementing the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). For the most part, this is a measure that is of greater interest to organizations solely representing members of Reserve and National Guard components, relatively few of whom are active in VVA.

Even so, the possibility of a future conflict that will call forth a reinstatement of the draft stirs our memories of the woefully inadequate employment protections that were available a quarter of a century ago, when young men were pulled out of society and left to find their own way home. We believe that the protections written into the 1994 bill offer solid job protection, if they are enforced vigorously.

What impresses VVA is that USERRA *is* vigorously enforced. Making qualified personnel aware of their rights remains the key to enforcing them. VETS *closed* 1,252 cases last year, which seems to indicate that employees are getting the information they need. Another 1,240 cases were resolved in 1994. VETS is doing a vigorous job of implementing USERRA.

There is a mechanism for enforcing complicated laws that protect veterans from being denied jobs on the basis of military service. Jurisdiction is clear and there are consequences for employers who break the law. An astonishing *85% of the cases were resolved in 90 days or less.* All of the possible outcomes were included. Some claimants withdrew after learning they were ineligible for the protection they sought. VETS refused to press forward with other cases for the same reason. Others were handled administratively, while more than 10 percent were resolved by mutual agreement. *In over a quarter of the cases, full restitution of pay and benefits was the outcome.* For those of us struggling to find a way to get the veterans preference laws enforced, this is a thrilling set of numbers.

A Guerrilla War

What has long been a guerrilla war is being conducted openly today by pundits and federal managers, opposed to what they term "quotas for good old boys." Critics now view veterans preference as a system of favoritism that forces the government to hire white men over more qualified women and minority job applicants. The marvel is the idea that veterans preference denies anybody jobs, when it works infrequently at best due to systematic collusion to ignore federal law in federal agencies. VVA is appreciative of efforts of members of this subcommittee, and especially your own recent statements, Mr. Chairman, on the importance of veterans preference, and trusts that we need not defend before this subcommittee the idea that veterans preference is a legitimate part of merit hiring.

Federal agencies admit cheating on veterans preference to hire non-veteran men and women. GAO found in 1992 that in 71 percent of the situations when a veteran was at the top of a Civil Service register, the register was returned unused and the law was circumvented. Other methods include tailoring job descriptions to fit the qualifications of particular individuals, or listing jobs as "intermittent" to discourage veteran applicants. Illegal? Sure, but there is no remedy. An unsuccessful federal applicant who suspects discrimination based on sex, race or religion can appeal to the Equal Employment Opportunity Commission (EEOC). A cheated veteran has no such recourse.

The most effective protections for veterans under veterans preference laws are primarily for job retention during reductions in force. Throughout the federal government, bureaus and offices are being "reorganized" to skirt RIF protections. The U.S. Postal Service (USPS) came to a major clash with President Clinton when it tried this on a massive scale, arguing that if the law were enforced for veterans, USPS would have to fire women and minorities. This same gimmick appears now in smaller parts of federal agencies that escape the budget-shorn efforts of OPM to make federal agencies obey federal laws.

Not a Partisan Issue

It has made little difference for veterans preference who has sat in the White House during the past two decades. Direction from presidents and their appointed officials has varied from outright hostility to malignant neglect. President Clinton's strong statements of support have been welcome, but with the exception of the Administration's reversal of USPS's bogus "reorganization" scheme two years ago, the message has still not reached the senior level civil servants who hold themselves immune to Title 5 U.S.C..

Violations of veterans preference and affirmative action provisions should be considered prohibited personnel practices. Nobody in the veterans community advocates the use of goals and timetables. But federal agencies routinely hold training to explain the rules and the point of affirmative action hiring for women and minorities, as well as on topics that range from sexual harassment to cultural diversity in the workplace. It would harm no agency to learn the whys and hows of veterans preference.

The major difficulty in enforcing veterans preference is rooted in the current class of senior bureaucrats. A great many have disliked veterans preference throughout their careers in civil service because they did not serve in the military, and thus have had to contend for competitive positions against preference eligible veterans. They do not understand the value to either the nation or to individuals of serving in the armed forces, and see no reason to reward such service. Many are inclined to think veterans were simply too stupid to avoid wearing the uniform.

Reductions-in-Force

It is widely claimed among such senior bureaucrats that serious enforcement of veterans preference would harm efforts to retain women and minorities in time of major downsizing. This echoes a similar but fortunately much briefer period in which proponents of aggressive recruiting practices for either women or minorities warred with each other over which deserved higher priority. Just as there are minority women, there are minority veterans, women veterans and minority women veterans.

Part of the culture of bureaucracy is that nothing is worse than a Reductions-in-Force (RIF), and it is an understandable feeling. Unlike planned buy-outs and early retirements, RIFs put employees out of work, and in significant numbers. People lose their jobs, and lose them with no real warning. RIFs roll through agencies like avalanches, and those in the way see no rational intelligence behind them.

The process is complicated, though it was designed to be straightforward and mechanical, sparing no "favorites." That mechanical nature was intended to protect managers from lawsuits based in discrimination or cronyism. Congress made veterans preference a significant protection for holding onto jobs during RIFs, along with seniority and good job performance evaluations. Veterans preference counts in a veteran's behalf during the first sort, and in the second round of competition, when protected employees "bump" others out of comparable jobs.

To employees who are fighting to keep their jobs – especially when a downsizing takes places in a less-than-buoyant economy – whatever helps somebody else seems irrational and unfair. Junior employees think seniority guarantees old, dead minds. Non-veterans feel that veterans preference is a shopworn prejudice from a bygone era, and mediocre employees think performance evaluations show merely who is popular and who is not. Despite twenty-some years of affirmative action hiring, women and minorities portray themselves as the "last hired, first fired."

The RIF rules have been carefully crafted. Where an agency is eliminated or reduced in size so drastically that the more humane forms of downsizing cannot be applied, the combination of veterans preference, seniority and performance evaluations should work to make a RIF spare employees with records of useful service and pare away those whose contributions have been less – and do so at a time in their lives when their options still lie before them and they can learn the lessons of having made less significant contributions.

Gimmicks to Avoid RIF Rules

Bureaucrats with their own agendas and their own proteges have devised a number of gimmicks, in recent years, for skirting the RIF rules. With so little enforcement of veterans preference laws, veterans have been an easy target for managers who want their own people left behind when the dust has settled. Although several "reorganizations" – downsizing gimmicks conducted in avoidance of the RIF rules – have been justified with the argument that if they are not allowed, it will be women and minorities who will suffer, the evidence is that white male non-veterans do best in most of these schemes.

One of the most patently dishonest has been the use of single position competitive level slots. To claim that no job at an agency is like any other makes bumping based on higher performance, seniority or veterans preference impossible. Single position competitive level slots are a sham Congress must not permit.

Veterans preference in federal hiring was written into law because training and service to the nation in time of war measure and stretch a person's character. Like seniority and performance evaluations, it is an imperfect gauge of effectiveness on the job, but each of the three gives the merit system something additional to evaluate beyond civil service tests. The three serve together in the RIF rules so they reinforce each other. A veteran with only brief job experience and low performance evaluations has very little extra protection. A veteran with significant government experience and excellent performance evaluations is the strongest employee in time of downsizing, and ought to be. If Congress wants to safeguard performance while cutting the size of federal programs, remember that veterans preference still serves as a cornerstone of the merit system.

The Problem Is Enforcement

Veterans are in agreement that the heart of the problem with veterans preference is that it is not enforced, and has not been since the creation of the Merit Systems Protection Board (MSPB) in 1978. MSPB never rules in favor of the veteran in a veterans preference case. If the case involves a job applicant (rather than a current employee), MSPB denies that it has jurisdiction, though nobody else does either. Case dismissed. Should an employee file a case, MSPB will rule that the consistency with which it has refused to enforce Title 5 U.S.C. amounts to a compelling body of case law, and will cite its own truculence as authority. Case dismissed.

For years OPM was in collusion with other agencies to ignore violations. Now Director James King finds he has inherited an OPM which has delegated away its authority over federal personnel practices. Congress has reinforced this by gutting OPM's budget, so that OPM cannot enforce Title 5 U.S.C. effectively.

The Court of Veterans Appeals (COVA) has no jurisdiction, and has limited its own legal horizons to compensation benefits awarded by the Department of Veterans Affairs. Similarly, EEOC was defined in law and has continued to be a body whose focus is on issues of discrimination by age, race, gender, religion, sexual orientation, or physical disability. Neither COVA nor EEOC has any promise as a body to take on the responsibility for enforcing veterans preference cases.

Yet some institution must be adapted for the purpose of enforcing the law. A month ago, VVA listed measures in testimony before the House Committee on Government Reform and Oversight's Subcommittee on Civil Service, suggesting, in the apparent absence of any other option, that MSPB be given sharply-delineated new rules – amounting to a major reform – that would make it workable for the enforcement of veterans preference.

Congress by statute or the President by executive order could not only clarify MSPB's jurisdiction to make it responsible for veterans preference appeals, but set requirements that that MSPB rule for veteran appellants when they have been wronged. MSPB's jurisdiction should be spelled out in bold letters to include every case in which a veteran appeals any personnel decision on grounds of a violation of veterans preference. This jurisdiction must apply to individual and class actions, and to the competitive and exempted services.

Certainly, changes would need to be made so that MSPB becomes a user-friendly and effective appeals system. Its rulings and internal papers need to be accessible to veterans and veterans' advocates, and MSPB must be required to report periodically to Congress in a way that will allow Congress to evaluate its performance. Legislation or executive orders designed to accomplish these ends will need to be written so tightly that no federal bureaucrat can sidestep them.

Another New Alternative

In recent weeks, as the veterans service organizations (VSOs) sought a workable solution, Gen. Preston Taylor of VETS published a report on the enforcement of USERRA by VETS. The numbers we cited in the USERRA discussion above caught our eyes, and are worth repeating here:

> [T]here is a mechanism for enforcing complicated laws that protect veterans from being denied jobs on the basis of military service. Jurisdiction is clear and there are consequences for employers who break the law. An astonishing *85% of the cases were resolved in 90 days or less.* All of the possible outcomes were included. Some claimants withdrew after learning they were ineligible for the protection they sought. VETS refused to press forward with other cases for the same reason. Others were handled administratively, while more than 10 percent were resolved by mutual agreement. *In over a quarter of the cases, full restitution of pay and benefits was the outcome.*

If Congress can adopt legislation empowering VETS to effectively enforce legislation forbidding private sector employers – over whom Congressional powers are relatively limited – to discriminate against veterans, why cannot Congress adopt legislation empowering VETS to effectively enforce legislation requiring federal agency employers – over whom Congressional powers are much greater – to obey federal laws making veterans preference part of the merit hiring system?

Congress by statute or the President by executive order could make VETS responsible for veterans preference appeals. That jurisdiction would also have to be spelled out in bold letters to include every case in which a veteran appeals any personnel decision on grounds of a violation of veterans preference. This jurisdiction must apply to individual and class actions, and to the competitive and exempted services.

Certainly, rules will need to be written so that VETS will be a user-friendly and effective appeals system. Its rulings and internal papers need to be accessible to veterans and veterans service organizations, and VETS must be required to report periodically to Congress in a way that will allow Congress to evaluate its performance. Again, legislation or executive orders designed to accomplish these ends will need to be written tightly, because federal agencies are reluctant to get tough with one another. But there is no greater enforcement mechanism than one that allows ultimate access to our nation's courts.

Procedure.

Within the past two weeks, Mr. Chairman, the VSOs have been challenged by a question you have put before us to suggest a solution rather than name the problem once again. The VSOs have agreed that a procedure could be created for addressing veterans preference complaints through VETS. We recommend a series of steps similar to other complaint procedures, aimed at allowing initial resolution through clarifying the law to both parties. An analogous system could be used were MSPB the agency responsible.

Step 1:

The veteran must file a complaint with the agency that allegedly violated his or her rights within 30 days of the alleged incident or notice of non-selection. The agency will have 30 days to resolve the complaint internally to the satisfaction of the individual. At the end of 30 days, if the individual is not satisfied, he or she may forego further rights under step 1 and proceed to step 2.

Step 2:

If the agency does not resolve the issue in 30 days or issues a decision unfavorable to the veteran, the veteran will have 15 days to appeal to the state-level, federally-appointed Director for Veterans Employment and Training (DVET). The DVET will have 60 days to resolve the matter. If at the end of 60 days the decision has not been rendered, the veteran will 15 days to proceed to step 3.

Step 3:

If the veteran does not receive a timely decision or a decision unfavorable to the veteran is made, the veteran may then file within 15 days with the Secretary of Labor. The Secretary will have 60 days to resolve the complaint and at any time may refer the case to the Solicitor General for subsequent prosecution in Federal District Court. If at the end of 60 days the veteran is still not satisfied, he or she may initiate action in Federal District Court on their own motion.

During any part of this process, the investigating body should make all attempts to resolve the case as early as possible.

Obstacles to be Overcome

There is no free ride in solving the problem of enforcing veterans preference. Making MSPB responsible would require serious change within that body, which many would argue is needed in any event. On the other hand, VETS is an underfunded, underprioritized agency with a growing list of tasks that have little to do with education and training. Veterans preference cases would be another of these.

It would be foolhardy to expect satisfactory outcomes were VETS given responsibility for veterans preference cases without some commensurate increase in staffing. That would probably also be true of using MSPB. The best guess of the VSOs as to caseload, based on the complaints we receive, is that there could be a significant impact – probably 200-300 cases per year at the outset, until agencies learn what the law is. If the USERRA caseload were a good model, it would suggest 20-30 FTEE dedicated to veterans preference cases.

That number may be reducible in several ways. A short but intense effort to reach hiring managers with an understandable interpretation of what is expected – probably including short training classes – would cut complaints. Vigorous executive action directing cabinet officials to include active veterans preference practices in performance evaluations for hiring managers would reinforce such a campaign.

Once there is a clear responsibility with a clear set of steps that include the possibility of being sued in federal court, we believe federal employers will enforce veterans preference law as effectively as they do affirmative action law. Many cases will no doubt be resolved by a single phone call which points out the liabilities of the course being taken. We cannot promise Congress that enforcing veterans preference will be cost neutral. Still, it can be a reasonable cost to protect a sound investment. We agree with your recent statement, Mr. Chairman, when you said, "Veterans Preference is more than an earned benefit, I believe the federal government has an investment in these brave men and women who have proven skills and invaluable experience."

Remedies

Whether the ultimate resolution of the routing of veterans preference complaints is made through MSPB or VETS, where there is a finding that veterans preference has been violated, the individual must be offered the job or a comparable job at the same pay level, effective the date of the individual's application. Concurrently, the veteran must be provided all back pay and benefits including back pay and benefits, including crediting of time for retirement, leave purposes and any other employment benefits associated with full time employment, and including credit toward the establishment of career status. Any back bay must come from existing agency appropriations, and no innocent individual should be penalized by losing a job or promotion to make the veteran whole.

Conclusion

There are no quotas in veterans preference. It is a recompense for military service that puts qualified men and women in federal jobs – a reinforcement for the merit system. Does it require hiring a man instead of a woman? Sometimes it does, and sometimes it requires hiring a minority veteran applicant instead of a white one. Sometimes veterans preference will require hiring a woman instead of a man, if the woman took the time and the risks involved in military service and the man did not.

Mr. Chairman, this concludes our testimony.

STATEMENT OF PRESTON M. TAYLOR JR.
ASSISTANT SECRETARY OF LABOR
FOR VETERANS' EMPLOYMENT AND TRAINING
BEFORE THE SUBCOMMITTEE ON EDUCATION, TRAINING,
EMPLOYMENT AND HOUSING
HOUSE COMMITTEE ON VETERANS' AFFAIRS
MAY 30, 1996

Mr Chairman and Members of the Subcommittee

Thank you for the invitation to testify on the Uniformed Services Employment and Reemployment Rights Act (USERRA) at today's oversight hearing

It has been almost a year since your June 29, 1995, hearing at which I reported on VETS' implementation of USERRA during the months following its October 1994 enactment This morning I would like to highlight observations from the first annual report on USERRA as submitted to Congress by Secretary of Labor Robert B Reich at the beginning of this month Additionally, I'll note for the Subcommittee several current issues with potential program impact and discuss the Department's plans for improving program administration

USERRA, of course, was designed to clarify and strengthen the existing veterans' reemployment rights law first passed in 1940 and amended several times thereafter USERRA, like the veterans' reemployment rights law it replaced, provides job security to employees who leave their civilian jobs to enter active uniformed service, voluntarily or involuntarily With certain limits, the law generally entitles an individual who serves in the uniformed services to return to his or her former civilian job after being discharged or released from active duty under honorable conditions For purposes of seniority, status, and pay, the employee is entitled to be treated as though he or she never left

The scope of USERRA's impact is significant Approximately 1 7 million Americans are now in the National Guard and Reserve Additionally, over 100,000 non-career servicemembers leave active-duty military service annually The importance of USERRA as an employment protection lies in its constant support of those National Guard and Reserve members who attend regular and special training activities, and who may be called upon at anytime in response to crises, whether they be fighting in the Persian Gulf, peacekeeping in Bosnia, or controlling the flood waters of the mighty Mississippi.

Under USERRA, new responsibilities were assigned to VETS, as well as other federal agencies, including the Departments of Defense, Treasury, and Justice, the Office of Special Counsel, the Office of Personnel Management, the Federal Retirement Thrift Investment Board, and the intelligence community agencies. For the first time, federal executive branch employees were provided assistance from the Department of Labor. Improved levels of coverage also were given to employees in the legislative and judicial branches, and to National Guard employees in the states.

In the first year under USERRA, VETS opened 1,387 new cases and continued the investigation of 167 cases opened the previous fiscal year under the predecessor veterans' reemployment rights law. Cases opened increased 15 percent over the number of cases opened in FY 1994. This increase is partially attributable to cases opened on behalf of employees in the federal government. The remainder of the increase may be attributed to the extensive publicity and education efforts of the Departments of Defense and Labor following the enactment of USERRA.

Of the cases opened in FY 1995, 77.7 percent involved private employers, 16.6 percent involved states or the political subdivisions of states, and 5.4 percent involved federal agencies. Of the cases open, 77 percent were on behalf of Reserve component personnel, 21 percent on behalf of veterans, and 2 percent on behalf of persons who were undergoing examination for military service.

Many cases involved multiple issues. The two most common complaints involved an employer's refusal to reinstate or reemploy an individual following a period of military service, and an employee's discharge from employment because of military service or obligation. Other causes for complaint included the refusal of an employer to hire an individual with a military obligation. Also involved were questions of seniority, vacation, pension benefits, health benefits, and retraining or reasonable accommodations for disabled servicemembers.

Last fiscal year VETS issued one subpoena under its new USERRA authority. That case involved a single employer and eight claimants.

In FY 1995, VETS closed 1,252 cases, of which 85 percent were closed in 90 days or less and 91 percent were closed in 120 days or less. Sixty-seven cases -- five percent -- were processed for referral to the Attorney General and only one case was processed for referral to the Special Counsel. Claimants recovered $710,062 in lost wages and benefits as a result of actions by VETS, and $236,033 as a result of efforts with the Department's Office of the Solicitor and the Department of Justice.

A trend VETS notes is that the number of cases opened on behalf of Reserve component personnel continues to increase as a percentage of the total number of cases opened. In FY 1992, 59 percent of cases were opened on behalf of Reserve component personnel. This percentage increased to 69 in FY 1993, to 75 in FY 1994, and to 77 percent in FY 1995. This steady increase may be attributed to the growing use of the Reserve components to provide for national security, and the decreasing number of personnel in the active components'

At the Subcommittee's legislative hearing on August 2, 1995, I testified on behalf of the Department in support of certain technical and clarifying amendments to chapter 43 of title 38, United States Code -- amendments that later were incorporated in title III of H.R. 2289 as approved by the House of Representatives in December 1995. The Department supported them again last week in testimony before the Senate Veterans' Affairs Committee. These amendments are needed to provide for the effective implementation of USERRA.

Additionally, Mr. Chairman, changes to the Internal Revenue Code are required to reconcile the qualification provisions of the Code that apply to employee pension benefit plans with the requirements of USERRA. Needed changes would allow employees and employers to make up contributions to their pension and profit sharing plans for the period the returning servicemember was on active duty. USERRA requires employers to do this and also permits returning servicemembers to opt to make-up employee contributions to the plans in order to be entitled to accrue benefits based on those contributions. The problem is that employers cannot act without risking disqualification of their plans under the current tax code restrictions.

When USERRA was enacted, a provision was included giving plans until October 12, 1996, to comply with the new law. Some employer associations have concluded that if the needed tax code changes are not made by the October deadline, there will be confusion as to their obligations under USERRA.

I realize that the House Veterans' Affairs Committee does not have jurisdiction over changes to the tax code and that the Chairman and Ranking Member have voiced to the Chairman of the Ways and Means Committee the need for a tax code amendment. I believe, however, that it is important to reiterate the issue for the record at this oversight hearing.

I note that the President's FY 1997 budget submission contains provisions that would amend the Internal Revenue Code to clarify the tax treatment of contributions made pursuant to USERRA, as does his recently proposed Retirement Savings and Security Act, H.R. 3520. I also note that H.R. 3448, which passed the House on May 22 by a vote of 414-10, contains substantially identical provisions.

Mr. Chairman, I also would like to make the Subcommittee aware of my concern for the applicability of USERRA to Reserve component personnel employed outside the United States. Foreign companies operating abroad generally cannot be held to United States law. But it also appears that USERRA does not apply to U.S. companies with regard to their offices or branch operations in foreign countries nor to employment practices of federal government agencies regarding their employees outside the United States.

DoD now reports that with the recent activation of Reserve component members for Operation JOINT ENDEAVOR in Bosnia, the reemployment rights of activated Reserve component personnel employed outside the United States has become an issue Currently, DoD is releasing Reservists called to duty for the Bosnian peace-keeping mission Those returning to their positions of civilian employment include several hundred Reservists employed outside the United States by either a U S firm or a federal agency With their reemployment at risk, their continued service in Reserve units based overseas is called into question

The Supreme Court, in EEOC v. Arabian American Oil Co , 111 S Ct 1227, 1234 (1991), held that there is a presumption against applying U S laws outside the United States unless the Congress has expressly indicated that such application is intended Since USERRA does not include specific language evidencing an intent for the law to govern the employment practices of United States employers who employ United States citizens abroad, the law may apply only within the territorial jurisdiction of the United States

Even if the law were deemed only to apply within the jurisdiction of the United States, administrative means can be used to ensure that the spirit of USERRA is observed by the federal government in dealing with its employees throughout the world In USERRA, Congress declares that the federal government should serve as a model employer And regarding non-U S Government employers of U S citizens outside the United States, nothing precludes the use of moral suasion to induce them to provide USERRA protections to their employees who are members of Reserve components Without language to rebut the presumption against extraterritoriality, however, the Merit Systems Protection Board might be in the unusual situation of lacking jurisdiction over certain USERRA claims by federal employees based on that presumption

Mr Chairman, having been made aware of a potential problem affecting Reservists living overseas, one that threatens the viability of the units to which they belong, the Subcommittee may wish to amend chapter 43 of title 38 to extend USERRA coverage to U S employers of U S citizens outside the United States If it does, I recommend reconsideration of the language used in the 103rd Congress Senate version of USERRA -- S 843 -- that was derived from the Age Discrimination in Employment Act (29 U S C secs 623(f) and (h)) Such language had been identified by the Supreme Court in the Arabian American Oil Co. case as an example of a statute that overcomes the presumption against extraterritorial application.

Another matter of concern, Mr. Chairman, is the March 27, 1996, ruling of the Supreme Court in the case of Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996). In Seminole, the Court held that the Commerce Clause of the United States Constitution does not empower Congress to abrogate state Eleventh Amendment immunity by enacting statutes providing for private rights of action against states in Federal court. The impact of the Seminole decision on the enforcement of USERRA is currently under review by the Department of Labor in conjunction with the Department of Justice.

The Department of Labor believes that the Seminole decision does not render invalid the substantive rights created by USERRA. States, as employers, remain under a statutory obligation to reinstate servicemembers without loss of seniority, status, or pay, and not to discriminate against them. In addition, most USERRA cases are resolved without legal action.

Consequently, on April 18, 1996, VETS issued a Director's Memorandum to its field staff to continue working on current and future USERRA cases without regard to the Seminole decision. Staff were instructed that if the decision is raised as a defense during the course of an investigation, they are to advise the parties that the matter is under review and that the USERRA fact finding still needs to be completed. Field staff are to inform the National Office when the Seminole decision is raised as a defense. Regional Administrators are to identify and report any USERRA cases with states or subdivisions of states under investigation or in the process of being referred to the Attorney General.

As I noted earlier, in FY 1995, 16.6 percent of VETS' USERRA caseload -- 232 cases -- involved states or the political subdivisions of states. We believe, however, that the Seminole decision does not affect the ability of individuals to bring USERRA actions in federal court against any units of local government not entitled to Eleventh Amendment immunity.

To date, no state has raised the Seminole defense in a USERRA case. I trust that states will continue to comply with USERRA as they did the predecessor law for over 50 years, even if Seminole might provide them with a defense to suit. If a state does not consent to suit, the Department of Labor, in conjunction with the Department of Justice, will analyze carefully the issue in each case. It is important to stress that the problem presented by Seminole arises only if a state raises an Eleventh Amendment defense to a suit by a servicemember.

Since it is possible that post-Seminole activity could draw legal challenges -- challenges that could take years to resolve in the courts -- the Subcommittee may wish to address this issue through amendments to USERRA. The Department will designate attorneys who are available to work with the Subcommittee, should it decide to craft legislation addressing these issues. VETS is committed to working with the Subcommittee and all interested parties to assure that all individuals who have substantive rights under USERRA -- whether they are employed by a private company, the federal government, or a state -- have an adequate means of enforcing those rights.

VETS also is committed to an efficient administration of the servicemembers' employment and reemployment rights program even as VETS is reducing the size of its work force. To address the problem of significant staff reductions in the National Office and an imbalance of skills to accomplish existing work, VETS established, effective March 31, 1996, the USERRA Regional Lead Center (RLC) in VETS' Atlanta Regional Office.

Under the RLC concept, the National Office will continue developing policy, providing operational and program oversight, and furnishing administration and budget support. The RLC will serve VETS staff at various organizational levels with each organizational level having different needs. The RLC will collect data from field offices, provide analysis and deliver information to the National Office. It will conduct research, provide technical assistance to field offices and provide information to assist the National Office's development of congressional testimony. Quality customer service will be paramount and the driving force in all actions of the USERRA RLC.

To help accomplish these activities, the RLC will use a cluster of USERRA experts selected from a cross section of experienced VETS field staff to perform specific defined tasks based on an annual work plan. The majority of the cluster's work would be via the mail, telephone, or electronic communications systems.

The Office of the Solicitor plays an important role in USERRA. Under the RLC concept, Regional Solicitors will continue in their current capacity and will be consulted regarding questions which do not involve novel or precedent-setting issues and cases that would be litigated within their jurisdiction. The Associate Solicitor for Labor-Management Laws will continue to handle all other legal work.

VETS is developing a new reporting and tracking system for USERRA cases. The system will be accessible by all VETS staff through Internet. It will be useful for management assessment of trends as well as individual investigator control of workload.

Soon after the enactment of USERRA, VETS provided each of the federal field staff responsible for USERRA with special training on the new law provisions. USERRA procedures also were made part of the basic course provided to all new state-grant employees. In 1995, VETS published a program operations manual. In addition, VETS, through its contract with the National Veterans Training Institute in Denver, Colorado, developed an investigators' course for USERRA.

In closing, I would like to recognize the close relationship VETS has developed with DoD's Office of Reserve Affairs and its National Committee for Employer Support of the Guard and Reserve. Our organizations are truly partners at both the national and local levels. The need to work closely in the labor-intensive early period of the new-law implementation significantly strengthened already existing ties. As a special expression of our interagency bonding, the Office of Reserve Affairs, at my request last fall, detailed Colonel Cheryl Brown to my National Office staff for a full year. Colonel Brown has been of enormous help in improving USERRA operations, providing the perfect conduit between the program administrators at Labor and the program participants at Defense. She was a particularly important resource in the development of our Bosnia action plan.

Mr. Chairman, I am proud that my agency has met successfully each of the many challenges it has been presented in the implementation and administration of a new, comprehensive law and is now positioned to continue adjusting to the ever-changing demands of this program.

At this point, I'll end my formal testimony and respond to any Subcommittee questions.

STATEMENT OF
HONORABLE JAMES B. KING
DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT

before the

SUBCOMMITTEE ON EDUCATION, TRAINING
EMPLOYMENT AND HOUSING
COMMITTEE ON VETERANS' AFFAIRS

at a hearing on

THE VETERANS' PREFERENCE LAW

May 30, 1996

Mr. Chairman and members of the Subcommittee:

Thank you for the opportunity to testify on the Clinton Administration's strong record of support for the Veterans' Preference Act.

I believe wholeheartedly, as does President Clinton, that veterans' preference is an earned right and must be treated as such.

This administration has a three-year record on veterans' preference that we are proud to put before you and the American people.

First, let me say that the number of veterans in the federal workforce has been declining for a number of years. There are two reasons for this. The first is the downsizing of government.

The second is the aging of the veterans' population and the retirement of so many veterans of World War Two, Korea, and even the Vietnam war.

In Fiscal Year 1995, of federal employees age 55 to 64, 43% were veterans.

Of those age 45 to 54, 39.5% were veterans.

But among those age 35 to 44, 20.9% were veterans and of those age 20 to 34, that figure drops to 6.9%.

As of last year, veterans made up 27% of the federal workforce, but in the past six years, they accounted for more than half of its retirements.

As the number of veterans declines, one measure of the success of veterans' preference is that the percentage of federal civilian jobs going to veterans has risen dramatically.

An average of 18.5% of the women and men hired for full-time, permanent positions in Fiscal Years 1990, 1991, and 1992 were veterans.

For Fiscal Years 1993, 1994 and 1995, that figure rose to 31.1%, an increase of more than 50% in three years.

Mr. Chairman, as a veteran, I am proud of those figures.

Let me give you another example.

The vast majority of veterans are men.

In 1995, 47.7% of the 24,846 men age 20 or older who were hired for full-time, permanent federal jobs were veterans.

That is more than double the 22.4% of the men over 20 in the national workforce who are veterans.

I should add that 10.8% of the 19,819 women age 20 and over who were hired for full-time permanent federal jobs in 1995 were veterans. That is nearly eight times the percentage of women veterans -- 1.4% -- in the national workforce.

This is not rhetoric. These numbers reflect real men and women -- about 14,000 of them last year -- who are joining our civil service, largely because of their own skills and talents, but in part because of veterans' preference.

At a time of intense competition for federal jobs -- there are 8.3 applications for each available position -- these figures demonstrate that eligible veterans are being well served by veterans' preference.

Mr. Chairman, in your letter of May 19 you raised two questions.

First, you noted the subcommittee's interest in redress mechanisms for those veterans wishing to pursue their rights.

It is inevitable, when tens of thousands of job applications are processed each year by OPM and scores of agencies, that mistakes will be made. When we hear allegations of them, we investigate and take appropriate action.

Further, acting under existing law, the Office of Personnel Management has entered into a Memorandum of Understanding with the Labor Department regarding the handling of complaints of veterans' preference violations in hiring.

The Labor Department is responsible in the first instance for reviewing complaints. If Labor does not resolve a case, it is referred to OPM for investigation and final action.

The Labor Department has some 3,000 local Veterans' Employment Representatives, available at State Employment Service offices, who resolve the vast majority of issues that arise.

I believe there is a need for better communications of veterans' rights.

We find that many veterans do not understand what rights they do have. I believe that is why the Labor Department's local representatives are able to resolve so many inquiries simply by explaining the law.

Five cases reached OPM last year and one of those was found to involve a valid issue of veterans' preference.

The Office of Special Counsel (OSC) also plays a role in the redress process. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) vested OSC with authority, in certain cases, to represent a federally employed veteran or reservist before the MSPB, and potentially the U.S. Court of Appeals for the Federal Circuit, in the event that a federal agency fails to reemploy that person in accordance with the provisions of the Act.

Under USERRA, cases are referred to OSC from the Department of Labor. OSC received one case during FY 1995 which is currently being investigated.

Mr. Chairman, we believe that the existing system is fairly and efficiently enforcing veterans' preference.

However, we are aware that some veterans and veterans service organizations believe that a new, more formal appeals process would improve the system.

Should Congress decide that such a mechanism is needed, we would work with you to achieve it, as we would support any action that would better serve the rights of veterans.

In addition to our work with the Labor Department, OPM has important oversight responsibilities with regard to veterans' preference.

Our core mission is the protection of the merit system and we consider veterans' preference basic to that system.

Our Office of Merit Systems Oversight and Effectiveness, as part of its regular, governmentwide review process, evaluates whether agencies are fully enforcing veterans' preference.

When violations are found, we direct the agency to take corrective actions. These can include removing an employee from a position in favor of a veteran who has been wrongly denied preference.

In addition, OPM's Employment Service reviews the medical record when disabled veterans are denied employment on medical grounds. On average, we overturn 40% of the decisions adverse to disabled veterans, enabling them to enter the jobs for which they are qualified.

Mr. Chairman, your letter also noted your interest in the use by agencies of single-person competitive levels and alternative personnel systems.

Each agency has the responsibility for carrying out reductions in force (RIFs) in accordance with law and OPM regulations. By law and regulation, veterans are entitled to preference over other employees during RIFs. This protection has not been significantly changed in more than 50 years.

As part of the RIF process, each agency must determine appropriate competitive levels. This determination is based solely on each employee's current position description, not on personal qualifications.

It is true that a competitive level could consist of a single employee, particularly in the case of workers with highly specialized skills. But in all cases OPM regulations require agencies to establish competitive levels solely on the basis of the duties of the positions in question.

Moreover, qualified veterans have the right to "bump" and retreat non-veterans in other positions in the agency where the RIF is taking place.

In all these ways, veterans' preference continues to provide strong protections for qualified veterans during RIFs.

For example, the total workforce of the U.S. Geological Survey was 2,192 prior to last year's RIF. Of this total, 292 employees qualified for veterans' preference protection. Of them, nine, or 3.1% were separated.

This compares with 268 non-veterans who were separated, who represented 14.1% of the total non-veteran workforce.

You asked about alternative personnel systems. For the past five years the Department of Agriculture has operated a demonstration project that has tested an alternative to the "rule of three" in hiring. In this program, applicants are designated either "quality" or "eligible," based on their qualifications.

Qualified disabled veterans are automatically placed in the quality group. All candidates in the quality group are available for selection, with absolute preference given to veterans.

This project was carried out in units of the Forest Service and Agricultural Research Service and involved about 5,000 new hires. It has been called a success by both managers and veterans.

Managers say it gives them more flexibility and better selections, and veterans service organizations have found that it leads to a higher percentage of veterans being hired. We believe this system could appropriately be used elsewhere in government.

We are demonstrating our support of veterans' preference in many other ways. The administration's proposed civil-service reforms reflect our full support of veterans' preference, as do the guidelines that OPM issued recently on the new Performance Based Organizations, or PBOs.

Mr. Chairman, we will work with you in any way we can, under the law, to better carry out our solemn obligation to the veterans of America.

Thank you. I welcome your questions.

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STATEMENT OF

CELIA P. DOLLARHIDE

DIRECTOR, EDUCATION SERVICE

VETERANS BENEFITS ADMINISTRATION

DEPARTMENT OF VETERANS AFFAIRS

BEFORE THE

SUBCOMMITTEE ON EDUCATION, TRAINING, EMPLOYMENT AND HOUSING

COMMITTEE ON VETERANS' AFFAIRS

HOUSE OF REPRESENTATIVES

MAY 30, 1996

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to appear before the Subcommittee to provide the views of the Department of Veterans Affairs (VA) on a legislative proposal affecting VA's education assistance programs. This draft bill would (1) eliminate the distinction between open circuit television and independent study courses; (2) modify the medical certification requirements for flight training; (3) authorize education benefits for courses necessary to maintain or restore professional or vocational certification or proficiency; (4) award benefits based on full resident training rates for cooperative training pursued at half-time or more; and (5) amend the minimum education requirement for entitlement to Montgomery GI Bill benefits. We fully support this proposal and, as further discussed below, believe these amendments to VA's education assistance programs to be both equitable and necessary.

Section 1 of the draft bill would amend title 38 education program provisions to approve courses of instruction offered by open circuit television without the present requirement that such courses be pursued as an integral part of resident training leading to a standard college degree. Under current law, eligible individuals are permitted to pursue other nontraditional courses, such as independent study, without a concurrent enrollment in resident training. Further, most American colleges today consider open circuit television courses a form of independent study. We agree that open circuit television courses should have no more stringent requirements for approval than any other nontraditional course and, therefore, favor the elimination of this distinction.

Section 2 of the bill would eliminate the termination of an individual's Montgomery GI Bill (MGIB) education benefits for flight training because of the individual's temporary failure to meet the medical requirements for eligibility under that program. As a necessary condition for approval of an individual's enrollment in a course of flight training under the MGIB, the individual must meet the medical requirements for a commercial pilot's license. In a number of cases, some of these individuals have met the medical requirements at the beginning of their training, but during the course of the program have inadvertently let their medical certifications lapse, causing their flight training awards to be terminated. With enactment of this provision, eligible individuals will have 60 days after the successful completion of their flight training to meet the medical requirements necessary for MGIB eligibility.

Section 3 would authorize VA education benefits for courses necessary to maintain or restore professional or vocational certification or proficiency. Currently, education benefits cannot be approved for courses leading to an educational objective for which an individual is already qualified. This amendment would permit individuals who are trained as professionals to use their VA education benefits to pursue courses necessary to remain current in their chosen profession. It would also allow individuals to use these benefits to become recertified in areas in which they were previously trained.

Teaching is an example of one profession whose membership would benefit from this draft provision. This section of the bill would allow those individuals who have been certified in a particular vocation or profession to use their VA education benefits to sharpen their skills.

Section 4 would amend VA's education provisions pertaining to cooperative training to make two changes affecting both the training time required for the program and the rate at which the educational assistance for that training would be paid. Currently, VA provides educational assistance for cooperative training only when it is pursued full-time, and benefits are paid at 80 percent of the full resident training rate. Section 4 would permit cooperative training at a half-time or greater rate, thereby allowing a student the flexibility necessary in today's work place to pursue this type of training. Further, it would pay these students at a rate commensurate with the training time actually pursued. We believe this provision is necessary if the cooperative program is to remain viable in an economy where many employers prefer to hire part-time employees. In many cases, these employers have reduced existing cooperative students to less than a full work week, which prevents such students from obtaining VA benefits.

Finally, section 5 would amend the minimum education eligibility requirement for MGIB benefits to incorporate credits granted by educational institutions. At present, as a condition for establishing entitlement to education benefits, the MGIB generally requires that eligible participants must complete the requirements of a high school diploma (or equivalency certificate) or the equivalent of 12 semester hours in a program of education leading to a standard college degree before separation from active duty. This section of the bill provides that the minimum education requirement for MGIB benefits would be met, as well, if the individual is granted credit by his or her educational institution for the equivalent of at least 12 semester hours in a program of education leading to a standard college degree. There is no substantive reason to deny individuals who have been granted the requisite college credits their MGIB education benefits.

Our preliminary estimates indicate that the effects of the above provisions would increase direct federal spending by less than $5 million over 5 years.

Mr. Chairman, this concludes my testimony. I will be pleased to answer any questions you or the other members of the Subcommittee may have.

STATEMENT OF

SIDNEY DANIELS, DIRECTOR
NATIONAL EMPLOYMENT PROGRAMS
VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE

SUBCOMMITTEE ON EDUCATION, TRAINING,
EMPLOYMENT AND HOUSING
COMMITTEE ON VETERANS AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

WITH RESPECT TO
OVERVIEW OF VETERANS PREFERENCE

WASHINGTON, DC JUNE 10, 1996

Mr. Chairman, we appreciate the opportunity to submit this statement for the record regarding the VFW's thoughts on veterans preference laws and policies and how it is applied in the federal civil service of today. I preface my remarks by referring to earlier testimony given October 13, 1995, by Lennox E. Gilmer of the Disabled American Veterans (DAV) before the House Subcommittee on Civil Service, Committee on Government Reform and Oversight. At the invitation of the Civil Service Subcommittee Chairman, John Mica (FL), eight national veterans service organizations discussed and subsequently selected Mr. Gilmer to represent our viewpoints on the subject of federal veterans preference laws and policies.

These eight organizations are: Mr. Gilmer's Disabled American Veterans; American GI Forum; American Legion; American Veterans of World War II, Korea, and Vietnam (AMVETS); Non-Commissioned Officers Association; Paralyzed Veterans of American; the Vietnam Veterans of America; and my own organization, the Veterans of Foreign Wars of the United States.

The October 1995 testimony of this joint veterans organization included four salient recommendation and concerns that bear directly on this oversight hearing. They are:

Urge Congress to require the Office of Personnel Management (OPM) to maintain a pass-over and medical unsuitability decision at one central location (OPM Headquarters Office).

COMMENT: As OPM continues to downsize it is imperative that this medical unsuitability decision function not be included with the delegated examining authority currently being given to most title 5, United States Code (USC) agencies. To do so would destroy the credibility of any medical unsuitability decision made.

Encourage Congress to reduce the number of non-competitive and excepted appointing authorities.

COMMENT: So many non-competitive appointment authorities have been created over the years that dilution of veterans preference has occurred. A case in point is the "outstanding scholar program," a non-competitive hiring authority which permits an agency to hire any graduate at the bachelors level who maintained a 3.5 grade point average. A major flaw in this program is the fact that it does not give preference, for instance, to young Desert Storm veterans who meet or exceed all other requisites for the program.

Encourage [strengthening of Reduction In Force (RIF) provisions], making it clear that for veterans preference-eligibles, an assignment to a reduced grade, although they continue to be paid and maintained at their old grade level, constitutes a RIF from which they would derive veterans preference RIF protection. Veterans should have the right to appeal veterans preference RIF violations to the Merit System Protection Board (MSPB). We believe that all federal agencies should be subject to these requirements. We see no need to exempt any federal entity from these obligations.

We recommend amendments to current law providing veterans a complaint process which, in its initial stages, would be informal but would allow for appeals ultimately to the federal courts. This legal language should incorporate remedies which would provide veterans all benefits of employment as though the original error had not been committed.

These recommendations are crucial to the survival of veterans preference and would go far toward restoring the original purpose and intent of the Veterans Preference Act as enacted by Congress in 1944.

Mr. Chairman, the VFW is gravely concerned about the systematic dismantling of veterans preference laws and policies. This is not a perception, this is a stark reality. The 1992-93 illegal RIF at the U.S. Postal Service elevated abuses against veterans preference to a level unseen before. This action occurred as the Postal Service conducted a major restructuring in its workforce. They referred to their effort as a "reorganization" and did not require application of RIF procedures. Over 50,000 workers were displaced. Some were forced into retirement, many were told their positions and functions were being eliminated and that if they wanted to continue to work they would have to move to where similar jobs were available, from the east coast to the west coast or from the west coast to the east coast; and others were kept working at the same locations but at a reduced grade.

Several thousand complaints were filed with the MSPB by Postal workers claiming violations of their veterans preference rights under RIF procedures. Specifically, they were not allowed to "bump" or "retreat", as RIF procedures provide. And although the MSPB much later ruled the "reorganization" was in fact a RIF and required that certain corrective actions be taken, the understanding of the public is that the Postal Service got away with committing massive violations against the Veterans Preference Act.

Mr. Chairman, nearly four years after the Postal Service began its illegal RIF, many of the workers still have not been made whole. The VFW continues to receive letters from veterans claiming a violation of their veterans preference status. These letters are from past and present postal employees. Many other complaint letters are generated by veterans who work in other federal agencies that have recently conducted, or are currently conducting, a RIF action that appears to violate the veterans preference procedures. These agencies include the U.S. Geological Survey, National Aeronautical and Space Administration (NASA), and Congress' own General Accounting Office (GAO). I might add that OPM has essentially been a non-factor in terms of challenging the illegal RIF actions of these agencies or in providing timely interpretation of applicable laws and policies to protect veterans who end up becoming victims.

ALTERNATIVE PERSONNEL SYSTEMS

Based on the recent history of widespread abuse of existing personnel laws by federal agencies, the VFW is skeptical of the several alternative personnel systems that have been under review by OPM over the past two years. These systems are now being studied for possible legislative enactment by the House Subcommittee on Civil Service and the full Committee on Government Reform and Oversight.

Within the context of these Alternative Personnel Systems, OPM is seeking additional authority for federal agencies to test as many as six different examination demonstration projects. OPM asserts that veterans would fare better under these projects than they would under the current personnel system. Each of these demonstration projects would operate presumably for a period of five or six years, similar to the recently completed Department of Agriculture demonstration project.

Each of the six proposed demonstration projects would operate under varying hypotheses that, according to OPM, would result in agencies selecting more frequently all from certificates of eligible candidates. Also, each of the projects hypothesize that veterans would be selected in greater numbers than under the existing personnel system.

Mr. Chairman, the VFW is extremely skeptical of the projected outcomes being advanced by OPM. The merits of the demonstration projects have only been discussed in the briefest of terms. Consequently, very little is known about what the projects will or will not do. The VFW's position is that we favor "absolute" veterans preference. We therefore oppose approval of each of the demonstration projects where OPM cannot demonstrate that absolute preference will accrue to veterans.

While we recognize that this Subcommittee does not have direct oversight responsibilities over title 5, USC, matters, we nevertheless urge your strongest possible involvement in exploring the merits of OPM's six proposed demonstration projects.

Mr. Chairman, at this time I would like to focus attention on a little known program that offers great potential for veterans. Section 3310 of title 5, USC, requires that examination for certain federal positions be reserved for veterans preference-eligible veterans. The majority of positions covered by this provision are of the janitorial, messenger, security guard, and elevator operator variety and are generally compensated at levels GS-1 through 5.

Although these positions are not the most attractive in terms of prospects for a career path, they are still very important and in the past have served as an entry point into federal employment for thousands of veterans. Although hard data on the number of veterans who began their careers through a section 3310 position is hard to come by, it is universally acknowledged by sources at OPM that section 3310 worked very well at one time.

In recent years there has been a drastic reduction in the number of 3310 positions. This reduction is mostly the result of modernization and technology. Many janitorial jobs are now contracted out and new buildings come equipped with electronically controlled elevators. Government messengers are no longer required in great numbers as agencies can now transmit most communication more quickly and efficiently via fax machines or personal computers. In spite of these advances, however, we believe that section 3310 can again play a vital role for veterans seeking entry level federal jobs. We believe that section 3310 can and should be strengthened and we offer the following recommendations toward accomplishing that purpose:

Expand the number of positions reserved for veterans' preference eligibles. Amend title 5, USC section 3310 to require that OPM and covered agencies review existing permanent positions for suitability and inclusion as reserved positions for veterans' preference eligibles. Current positions that have potential for conversion to 3310 reserved status include certain driver and clerk positions (all agencies), cemetery laborer (DVA, DOD), etc. Review of positions for possible conversion to reserved status should be continued periodically.

Require through amendment that when an agency's janitor or guard positions are lost as a result of outsourcing, the successful contractor shall fill newly created positions similar to those lost by the agency. This should be done by conducting an initial competition limited to preference-eligible veterans. Performance of the initial competition should be made a material part of the contract.

Mr. Chairman, this concludes the VFW statement.

STATEMENT OF LARRY D. RHEA, DEPUTY DIRECTOR OF LEGISLATIVE AFFAIRS, NON COMMISSIONED OFFICERS ASSOCIATION

The Non Commissioned Officers Association of the USA (NCOA) appreciates the invitation of the Distinguished Subcommittee Chairman to present testimony on the veterans issues under consideration today. Also, the Association is deeply grateful for the energetic attention and focus that you, Mr. Chairman, have brought to these issues.

VETERANS PREFERENCE

Veterans preference laws served veterans, and indeed the Nation, well for many years. It is a sad day in the Nation when the Federal Government has ceased to be the model employer with respect to veterans. That commentary, Mr. Chairman, is precisely where we are today.

In many instances, perception is often the reality. For several years now, veterans have had the impression that veterans preference laws have become meaningless and/or are routinely ignored without consequence. Even a cursory examination of veterans employment in the federal work force could lead one to easily conclude the perception has a solid basis in reality.

A sterling example of why veterans perceive preference laws as meaningless is illustrated in the actions of the U.S. Postal Service in the last two and one-half years. Nearly 47,000 employers were displaced in management actions that the Postal Service called a "reorganization." Despite being dubbed a reorganization, the entire plan had one, and only one, overriding goal. That singular goal was to reduce costs by reducing people. Granted, some reorganization did in fact occur - no one argues against that contention. But, as the old saying goes - - if it walks and talks like a reduction in force - - the "reorganization" was a "RIF." Consequently, veterans retention rights were circumvented by one of the largest agencies in the Federal Government.

The actions by the Postal Service, actions supported by the Office of Personnel Management, cannot be tossed off as merely a perception among veterans. In NCOA's view, it was an overt effort to avoid veterans preference and retention rights.

Similarly, the situation as it exists today in the United States Information Agency (USIA) is not imaginary. It is very real and deeply troubling to the members of this Association. USIA Announcement Number 96-115, dated April 25, 1996 (Subject: Update on Foreign Service RIF Regulations), states: "...Veterans' preference will not be given for retired military..." That same announcement goes on to say: "...We are pleased to announce that for non-Broadcasting USIA employees we will not use RIF procedures to achieve reductions in FY 1996..." In other words, USIA officials are not only pleased to ignore veterans retention rights, they are more than happy to do so.

Another inescapable and indisputable fact was provided by the General Accounting Office (GAO). GAO statistics show that 71% of certificates are returned unused to OPM when a veteran applicant tops the list. That's fact, Mr. Chairman. NCOA also suggests that the increasing trend toward more decentralized hiring authority and what appears to be abuse of the authority to use single position competitive levels in RIF's is not serving veterans in either the spirit or intent of veterans preference law. None of the six alternative personnel systems demonstrate a protection for veterans preference as currently written in law. NCOA urges Congress to not approve any of these six systems without a full, complete airing before the appropriate Congressional Committees.

NCOA has listened to numerous speeches and read countless press releases on the current Administration's commitment to veterans and veterans preference. Frankly, this Association no longer places any credence in the rhetoric because the ensuant actions speak louder in an opposite direction. The two earlier examples underscore where the words and actions don't match. The Postal Service "reorganization" was supported by OPM. The actions taken by USIA were based upon OPM counsel and recommendations. If these two cases are representative of this Administration's commitment, then the commitment is completely hollow.

The singular fact that federal agencies and hiring officials can overtly and routinely ignore federal law with impunity is the most pressing issue on veterans preference that must be addressed in NCOA's view. It is indeed ironic that the full weight of the Federal Government can be brought to bear on a private sector employer when wrong doing is alleged but we seem unable to hold the Federal Government accountable where veterans and their preference is concerned.

Several ideas have been offered as to how accountability can be brought to the federal government, its agencies and hiring officials. NCOA believes the proposal to treat violations or avoidance of veterans preference as a "prohibited personnel practice" should be seriously considered. Federal agencies and hiring officials must be held accountable for violations of veterans preference laws to the same degree as they would for racial or sexual discrimination.

Treating violations of veterans preference as a prohibited personnel practice would be an important first step. It is equally important in NCOA's view to craft a redress system that:

> Is easily understood by veterans, federal agencies and hiring officials;

> Has a series of distinct steps that progress from informal to formal resolution of a complaint or violation;

> Provides remedy for the veteran; and,

> Contains punitive measures against agencies and officials found in violation of the law.

As the Distinguished Chairman and Subcommittee Members deliberate this aspect, NCOA requests that the Subcommittee review Subchapter III - Procedures for Assistance, Enforcement and Investigation - of the Uniformed Services Employment and Reemployment Rights Act, Public Law 103-353. Although USERRA is a federal law that pertains to employment/reemployment of armed forces members in the private sector and local and state government, NCOA believes that the model provided therein might be useful in structuring a redress system for veterans preference. The provisions of Subchapter III embody the concepts that NCOA espoused in the preceding paragraph.

Aside from being a relatively clear process, USERRA contains a rather striking feature that NCOA believes should be an integral part of redress for violations of veterans preference law. USERRA provides for the full force and resources of the Federal Government, through the Department of Justice, to be brought down on the private sector and local and state government. It just seems to NCOA that accountability in the Federal Government should be no less than that demanded daily from businesses, states and municipalities all across the Nation.

USERRA

NCOA appreciates the fact that a part of this hearing is devoted to taking a look at how well USERRA is working to protect the employment and reemployment interests of service members. It has now been about two and one-half years since USERRA was enacted; therefore, NCOA considers an oversight review timely.

The amendments enacted approximately one year ago provided additional strength to the law by closing potential loopholes. It is NCOA's impression that the new law is working well. That impression is based on two factors. First, NCOA has no first hand knowledge or involvement in a case which would indicate that the law is not working as intended. Secondly, the Association maintains close liaison with the senior enlisted leadership of the military services - - active, national guard and reserve - - and, we have received no feedback counter to our overall, general impression.

Although NCOA's report is generally positive, the Association has an obligation to inform the Subcommittee that a subtle bias appears to be creeping into the hiring and retention practices of employers with respect to individuals who are also active members of the Reserve components. Similar in many respects to the anti-veteran bias discussed earlier, NCOA is concerned about the signs that point to a potential anti-reserve bias. The Association has no data relative to this problem but NCOA has no doubts that National Guard and Reserve members are sometimes not hired by potential employers because of their military obligation.

Frequently, these hiring and retention problems are resolved when an employer is informed of the law and, if necessary, when USERRA proceedings are initiated. Most often, this is the case when an employer is unaware of his or her legal obligation. Just as often though, an applicant is rejected by an employer who is fully cognizant of the law. These employers know it is against the law to not hire someone who serves in the Reserve Components yet that fact alone is the deciding factor. We should not be so naive to believe that employers are not smart enough to assert other reasons to support their decision.

NCOA is not suggesting that this points to a deficiency in USERRA. As stated earlier, the Association believes the law is solid. Although difficult to prove in some cases, an allegation pursued through USERRA and subsequently proven, will make right most cases of wrong doing.

NCOA suggests there is another indirect factor that is coming into play in what the Association believes to be an emerging anti-reserve bias. Employers know fully that membership in the Reserve components is no longer a one weekend each month and two-week per year undertaking. They now see their employee-reservist being routinely taken out of the work place to do things that historically were accomplished by active forces. These same employers see their employee-reservist being activated for missions that a majority of

Americans do not support and which have no connection with defending the Nation's interests. They are also aware of the plans for Reserve forces to assume an even greater role and they can quickly assess what this portends for their livelihood.

NCOA is fully aware that this issue is not within the purview of this Subcommittee; nonetheless, this Subcommittee has to deal with the fallout from the above situation. Somehow, the definition of Reserve service has been summarily rewritten over the years and the consequence is being experienced daily by employers across this Nation. It hits particularly hard on the small business man or woman who employs Reservists. It is not an exaggeration to say that for some of these employers they have a full-time employee who is an asset to them only part of the time. Regrettably, NCOA cannot offer any suggestions relative to USERRA that would correct these active and reserve forces mix/balance questions.

DAVENPORT v. BROWN

Historically, a veterans eligibility for vocational rehabilitation programs was predicated on the causal relationship between a veterans service-connected disability and impairment to employment. The Court of Veterans Appeals decision in Davenport v. Brown overturned that historical precedent by striking down the requirement for such a causal relationship. The Court's decision is not without confusion and is being broadly interpreted that a veteran may receive vocational rehabilitation training even if their service-connected disability does not cause an employment impairment.

The draft bill under consideration today would codify the historical precept that governed eligibility for vocational rehabilitation training prior to the Davenport v. Brown decision. Specifically, the draft bill would amend 38 USC by requiring that an employment handicap for which a veteran may receive rehabilitation training must be related to the veteran's service-connected disability. The proposal would also take the additional step of reducing the eligibility threshold from 20% to 10%.

NCOA supports the draft proposal to reverse the Davenport v. Brown decision. In NCOA's view, the draft legislation places the emphasis where it should and must be. Eligibility for rehabilitation training, and indeed all VA benefits and services, should be linked to the veterans military service.

H.R.2851

H.R.2851 would amend section 3689 of Title 38 to provide for approval of enrollment in courses offered at certain branches or extensions of proprietary profit institutions of higher learning in operation for more than two years. NCOA supports this change.

H.R. 3459

The amendment to section 3720(h)(2) of Title 38 as proposed in H.R. 3459 would extend the enhanced loan asset sale authority of the Secretary of Veterans Affairs from December 31, 1966 to December 31, 1997. NCOA supports H.R. 3459.

Thank you.

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

OFFICE OF THE DIRECTOR

OCT 16 1996

Honorable Steve Buyer
Chairman
Subcommittee on Education, Training,
Employment, and Housing
Committee on Veterans' Affairs
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

In response to your follow-up questions from the May 30, 1996, hearing on veterans' employment in the Federal Government, I am forwarding the enclosed responses. I am also enclosing a list of agencies that have implemented, or at least requested OPM approval of, demonstration projects under chapter 47 of title 5, United States Code.

I hope you find the enclosures helpful.

Sincerely,

James B. King

James B. King
Director

Enclosures

Follow-up Questions to May 30, 1996, Hearing on Veterans' Employment

(1) With the hiring authority delegated to many agencies, the maintenance of a certificate of eligibles is virtually non-existent, and with the spinning off of OPM responsibilities, what do you see as the agency's future?

a) How will it maintain authority to enforce veterans preference?

b) If such authority to enforce veterans preference does not rest at OPM, where should it rest?

OPM executes delegation agreements with individual agencies to permit them to conduct open competitive examinations, as authorized by Congress. OPM certifies an agency to begin examining operations only after providing instruction to agency staff in proper examining techniques, including application of veterans' preference. We provide written operating guidelines and technical assistance to agencies and periodically review and recertify agencies to ensure that examining is conducted properly. We expect to continue providing strong direction to agencies that conduct their own examining, and, for agencies that request it, OPM will continue to conduct competitive examinations on a reimbursable basis.

OPM is responsible by law for enforcing veterans' preference provisions. We also are charged with establishing and maintaining an oversight program to ensure that delegated authorities are carried out correctly and in accordance with the merit system principles. In addition, we are authorized to order corrective action whenever we find that an action has violated any law, rule, or regulation, or is contrary to a delegation agreement. Under these authorities, OPM conducts an oversight program that includes audits of agency examining operations. When we find violations of the veterans' preference laws, we move vigorously to enforce them.

(2) Have you or your agency been able to review Mr. Mica's H.R. 3586, as amended and passed by the Government Reform and Oversight Committee, and are you in a position to specifically comment on Mr. Mica's redress proposal?

We certainly support, in principle, efforts to strengthen and clarify the right of veterans to preference in Federal hiring. At this time, however, we do not have specific comments on the redress provisions in H.R. 3586.

(3) Mr. King, in testimony on May 30, 1996, in front of my subcommittee, you stated that "agencies must request the

demonstration authority on the areas on which they think are problematic for them."

a) What are the parameters of such agency requests?

The demonstration project authority (Chapter 47 of title 5, U.S. Code) was established in the Civil Service Reform Act of 1978 to "determine whether a specified change in personnel management policies or procedures would result in improved Federal personnel management. . . ." Chapter 47 also provides that demonstration projects are "conducted by the Office of Personnel Management or under its supervision." Demonstration projects are an appropriate mechanism for change and improvement only when a waiver of a provision of title 5 or a regulation authorized by title 5 is required.

Requirements and parameters for demonstration projects are set forth in chapter 47 and include the following:

- no more than 10 active projects can be in effect at any time;
- no more than 5,000 individuals can participate in a project;
- projects terminate at the end of 5 years, except when extensions for evaluation purposes are required;
- formal project plans must be published in the Federal Register;
- consultation/negotiation with affected employees unions is required;
- employee and Congressional notification is required; and
- projects may not waive certain statutory/regulatory provisions, such as those governing leave, benefits, merit principles, political activity, and equal employment opportunity.

(b) What are the guidelines agencies are given for demonstration projects?

Agencies work closely with OPM to develop and evaluate demonstration projects. Statutory provisions in chapter 47 of title 5, U.S. Code, along with regulations in Part 470 of Title 5, Code of Federal Regulations, provide the guidelines and parameters agencies follow in designing and implementing demonstration projects. OPM's Office of Merit Systems Oversight and Effectiveness provides written guidelines and models for procedures.

design, and documentation.

(c) **Clarify what you meant by the statement "request the demonstration authority on the areas on which they think are problematic for them."**

Many opportunities and mechanisms for change are available to agencies, such as process reengineering, reinvention labs, and pilots under the Government Performance and Results Act. Regulations governing personnel management are increasingly providing opportunities for delegating and decentralizing functions, as well as otherwise expanding flexibility. Demonstration projects, which authorize a waiver of statutory and/or regulatory provisions governing personnel management, provide maximum flexibility but must be formally requested through comprehensive, formal project plans which appear in the Federal Register. Generally, before developing a project plan, agencies engage in extensive dialogue with OPM about organizational problems and needs in the personnel management arena. If appropriate, the next step is developing a concept outline and/or a proposed project plan. Procedures outlined in chapter 47 are then followed, including Federal Register notices, employee and Congressional notification, and appropriate evaluation and monitoring.

(4) **Please explain the RIF systems being employed by:**

(A) **The US Geological Survey**
(B) **The General Accounting Office**
(C) **The five foreign service-related agencies**

(a) **How did your agency ensure veterans preference policy was adhered to during the downsizing efforts at both agencies?**

(b) **Are the RIF systems with regard to veterans similar at both agencies?**

The United States Geological Survey is covered by reduction-in-force regulations authorized by chapter 35 of title 5, U.S. Code, as implemented in regulations published by OPM in Part 351 of Title 5, Code of Federal Regulations.

OPM's RIF regulations are derived from section 12 of the Veterans' Preference Act of 1944, as codified in sections 3501-3503 of title 5, United States Code. Under section 3501(b) of title 5, these regulations apply to most employees in the executive branch, unless otherwise provided by law.

OPM's retention regulations give weight to four factors in determining the order in which covered employees will be separated from employment in a reduction in force: (1) tenure of employment (i.e., type of appointment); (2) veterans' preference; (3)

length of service; and (4) performance ratings.

Section 3502(c) of title 5, U.S. Code, essentially provides that an employee who is eligible for veterans' preference, and is covered by OPM's retention regulations, must be retained over a non-veteran in a RIF. A subsequent revision to the law in 1978 (Public Law 93-454) added 5 U.S.C. 3502(b), which provides that a 30 percent or greater disabled veteran must be retained over a non-disabled veteran or a non-veteran in a RIF.

Agencies covered by these provisions are responsible for seeing that the regulations are followed. A covered employee who feels that he or she has been adversely affected by a violation of the regulations can appeal to the Merit Systems Protection Board. We would naturally be very concerned to find evidence of systematic violations of law or regulation relating to RIF. However, to our knowledge, the USGS complied with all appropriate regulations in conducting its reduction in force.

The General Accounting Office (GAO) is not covered by OPM's reduction-in-force regulations. GAO's Appropriations Act for Fiscal Year 1996 (Public Law 104-53) authorized the agency to establish its own retention system.

GAO's new retention system is based upon four retention factors similar to those set forth in OPM's regulations and retains absolute veterans' preference. Otherwise, the new procedures differ from OPM's RIF system in the crediting of employees' performance ratings and other mechanics.

Foreign Service Officers are not covered by OPM's reduction-in-force regulations. Instead, the Foreign Service Act of 1980, as amended by section 611 of Public Law 103-236, requires the head of each foreign affairs agency to develop reduction-in-force procedures for Foreign Service Officers which consider military preference as one of five retention factors. There is no statutory requirement that veterans serving as Foreign Service Officers be afforded the same retention preference that is applicable to employees covered by OPM's retention regulations.

Each of the foreign affairs agencies has adopted a different approach to take into account the five retention factors established in law. The Department of Commerce's Foreign Commercial Service, for example, uses a retention ranking system very similar to that in OPM's regulations, while the other foreign affairs agencies use different types of point systems to rank employees.

The Foreign Service Act requires that each agency consult with OPM before implementing retention procedures applicable to Foreign Service Officers. Our efforts in this area have focused on ensuring fair treatment for veterans, consistent with applicable provisions of the Foreign Service Act.

(5) Mr. King, additional questions about the USGS.

(a) Did in fact USGS claim that some 92.94% of all positions and 97.2% of the scientific positions in the entire Geologic Division were unique and required "unique" Competitive Levels? Is this an acceptable level for OPM?

(b) Can you verify that veterans were RIFed at a 29.67% rate, slightly lower than non-veterans, while managers running the RIF were impacted at 2%?

(c) How many former managers were adversely affected?

(d) Did managers compete as 'managers' or as scientists at USGS?

(e) In your estimation, did the RIF adversely affect older veterans? Please provide evidence for your conclusion.

(f) What were the breakdowns of adverse actions on veterans during the RIF for each of the Regional headquarters? ('Adverse actions' include downgrading and separations.)

There is no "acceptable level" of single-employee competitive levels under OPM's regulations. Instead, the agency makes a competitive level determination based solely on the individual position descriptions. If the duties of the positions differ significantly and no efficient interchange of duties is possible, positions must be placed in separate competitive levels for the first round of RIF competition. For example, managers are typically placed in separate competitive levels from non-managers.

We do not have the complete detailed statistics you requested on the impact of the USGS RIF on veterans and others within the agency. A recent report by the General Accounting Office (B-271982, dated August 1, 1996) to Chairman Mica of the Subcommittee on Civil Service of the House Government Reform and Oversight Committee provides updated statistical information about reductions in force in the U.S. Geological Survey. This report, and GAO's March 21, 1996, survey (USGS and OPM RIFs GAO/GGD-96-83R) are the most comprehensive statistical references we have yet seen on these matters.

In its most recent issuance, GAO reported that, while the percentage of veterans who were initially affected by the USGS RIF in first and second round competition (i.e., by release from their competitive level or bump and retreat to other positions) was roughly the same as the overall percentage of veterans in the USGS workforce (about 15 percent), veterans were much less likely to be separated in RIF than non-veterans and much more likely to retain employment and be placed in other positions at the same or lower grade.

The difference in the RIF separation rate for veterans and non-veterans is particularly significant. Only 2.6 percent of the Geologic Division's employees with veterans' preference were separated in the RIF whereas 10.7 percent of those without veterans' preference were separated. In the same population, the percentage of veterans who were able to bump or retreat to other positions in the RIF was roughly twice as high (20.2 percent) as the incidence of such placements among the non-veteran population (11.7 percent). GAO concluded that "employees with veterans' preference consistently fared better in the RIF than did employees without such preference." We have also found this to be the case in the workforce at large.

Data provided by USGS personnel officials showed that employees serving under permanent as well as nonpermanent (e.g., temporary) appointments were affected by the RIF. However, employees serving under nonpermanent appointments have no expectation of continuous or long-term employment and are almost always terminated in a RIF situation.

Data on permanent Geologic Division employees whom USGS personnel officials identified as having separated from USGS on or before the effective date of the RIF but not directly through a RIF action (e.g., through retirement, resignation, or interagency transfer) was not included in GAO's report on the USGS RIF. This is because there was no way to tell whether these former employees would still have left USGS employment as they did if the RIF had not occurred.

(6) Is veterans preference a part of the alternative personnel system being established for AmeriCorps?

Veterans' preference is a part of the alternative personnel system established for the Corporation for National Service, which is the administrative entity that funds the AmeriCorps program.

(a) Did OPM approve the personnel system for AmeriCorps?

Yes, OPM approved the alternative personnel system for the Corporation for National Service in a letter dated June 15, 1995, as authorized by the National and Community Service Trust Act of 1993. The Corporation, with a workforce of about 530 employees, was authorized by Congress to adopt an alternative personnel system outside of the provisions of title 5 that OPM administers, but the law provides that the alternative system cannot be implemented without OPM approval.

(b) **Do you have the authority to review the AmeriCorps personnel system?**

Yes, we have the authority to review the personnel system for the Corporation for National Service.

(c) **Do you have the authority to change the AmeriCorps personnel system?**

Our approval of the Corporation for National Service's alternative personnel system was subject to the understanding that any future changes to the Corporation personnel system would require the approval of the Director of OPM.

(7) **What would be the administrative impact of making discrimination against veterans in hiring, promotion and in retention a "prohibited personnel practice" on executive agencies and on OPM for enforcement?**

Such a provision would have no impact on OPM since the Office of the Special Counsel (OSC), not OPM, is responsible for enforcing the prohibited personnel practices.

We would support making violations of the principle of veterans' preference a prohibited personnel practice. We believe this approach could be a simpler, more flexible, and more meaningful approach to strengthening veterans' preference than inserting rigid, overly detailed, and complex restrictions into current provisions of title 5.

It should be noted that the bar against prohibited personnel practices cannot be waived for a demonstration project under chapter 47 of title 5. Therefore, it would be important for the provisions to be written in a way that would allow testing of alternative methods of applying veterans' preference in a demonstration project.

(8) **Does the administration view veterans preference as a diversity goal or as an earned benefit?**

From the very beginning veterans' preference has been considered an earned benefit.

(9) **Does the administration believe that it is pursuing enforcement of veterans preference as strenuously as it does EEOC goals?**

Absolutely. As the question implies, EEOC goals are just that-- goals. Preference for veterans, on the other hand, is mandated by law and is a requirement that we take very seriously.

(10) What training programs do you provide for managers to conduct and manage a RIF?

(a) Please provide copies of the curricula used.

(b) Do all managers of RIFs receive this training?

(c) What are your training requirements for veterans preference for managers, hiring specialists and agency directors?

While OPM provides information and assistance to Federal agencies and employees on the reduction-in-force process and other regulations we administer, we do not provide training. Instead, training programs on Federal reductions in force and staffing are available through the Department of Agriculture's Graduate School and other training providers, which are responsible for both course content and delivery. At their option, agencies may also choose to develop their own training programs on subjects relevant to their missions.

(11) Do agencies routinely conduct an EEO study any time within a 12 month window preceding a RIF?

(a) Within the last three years, what executive branch agencies have conducted such reviews?

(b) Why are such reviews undertaken?

(c) What are the findings of these reviews?

(d) Are there similar veterans studies undertaken prior to RIFs?

While agencies routinely prepare annual Affirmative Action Plans, Federal Equal Opportunity Recruitment Plans, Disabled Veterans Affirmative Action Plans, and other studies required by law or regulation, we are not aware of any Governmentwide requirement for agencies to undertake an equal employment opportunity or veterans employment study in a downsizing situation. Some agencies may conduct such reviews in downsizing situations, but OPM does not routinely review agency internal studies unless they fall under the type of statutory or regulatory requirements mentioned above.

(12) Is there any requirement at the Department of Defense to take actions to minimize the impact of a RIF on any non-veterans preference eligible group or groups of employees?

(a) Is there such a requirement to your knowledge at any other agency?

(b) **Please provide any policy documentation or communication that outlines such requirements.**

As indicated above, OPM does not routinely collect agency documents relating to internal operations or policies.

Although an agency has the right to decide which positions are abolished, whether a reduction in force is necessary, and when a reduction in force will take place, by law the four retention factors set forth in 5 U.S.C. 3502(a) (see answer to Question 4) determine which employees are actually reached for separation or downgrading because of reduction in force. The Department of Defense, as well as non-Defense agencies, are subject to the same reduction-in-force procedures based on the four retention factors established in section 3502(a).

DEMONSTRATION PROJECTS: A SNAPSHOT
June 10, 1996

ACTIVE AND POTENTIAL

NAME	TIMEFRAMES	PRIMARY INTERVENTION	CURRENT STATUS
USDA (active) (Forest Service & Ag Research)	Extended until June 1998.	Simplified external examining system.	FR was published 3/8/96 which incorporated control sites as experimental sites and modified evaluation plan.
VA (potential) (Veterans Benefits Admin New York & Detroit Regional Offices)	Targets: 1st FR: *7/96* 2nd FR: *10/96*	Skill-based pay system, linked to organizational measures, organizational and team performance, and skills certification.	Proposed project plan received from VA Secretary on April 4, 1996. Proposed project plan reviewed by OPM May 14-17, 1996. Subsequent meetings and work to refine compensation, employee relations, and RIF issues completed. Next step is OPM clearance to publish as 1st Federal Register Notice.

DoD LABORATORY DEMONSTRATION PROJECTS - POTENTIAL

NAME	TIMEFRAMES	PRIMARY INTERVENTION	CURRENT STATUS
AIR FORCE	1st FR Notice published May 15, 1996	Contribution-based pay in broad banding framework; contribution-based reduction in pay and removal; laboratory controlled rapid hiring (similar to Agriculture); streamlined removal process (similar to China Lake); 3-year probation for new hires, voluntary emeritus corps for retirees	Proposed project plan published in the Federal Register May 15, 1996. Four public hearings scheduled at four major lab sites: June 18: Rome Lab in Rome, NY, June 21 Wright Lab in Dayton, OH (Wright Patterson AFB), June 26: Armstrong Lab in San Antonio, TX (Brooks AFB), and June 27: Phillips Lab in Albuquerque, NM (Kirtland AFB)
NAVAL WARFARE CENTERS		Incentive Pay with broad banding framework (much like China Lake), direct hire to activity Commanders, performance management (two levels), RIF	NWC revised plan with DoD. Expecting formal transmission to OPM for review within the next few weeks OPM review of proposed project plan completed June 4-7, 1996
NAVAL RESEARCH LAB		Staffing (direct hire, single appointing authority.), Contribution-based pay in broad banding framework, contribution-based reduction in pay and removal; RIF	Continuing informal assistance Concept paper/plan completed and being briefed at DoD
ARMY		Staffing (direct hire, two appointment authorities, veteran's preference for Best Qualified only), broad banding, performance management (two levels), awards (no link to ratings), performance based actions, RIF, employee development (sabbaticals and degree training); 1-3 year probationary period	Concurrent OPM/DoD review conducted April 23-26, 1996. OPM and DoD are working with Army to assist with revisions. Plans are tentatively being made for a second concurrent review in July 1996, before final OPM clearance and approval to publish in Federal Register

PAST DEMONSTRATION PROJECTS

NAME	TIMEFRAMES	PRIMARY INTERVENTION	CURRENT STATUS
National Institute of Standards & Technology (NIST)	1988 - 1996	Broadbanding Pay-for-performance, and Staffing	Extended indefinitely by Congress (March 1996)
Department of Transportation - FAA	1989 - 1994	Retention allowances	Expired
Dept Of Navy "China Lake"	1980 - 1994	Broadbanding Pay-for-performance	Made permanent through P.L. 103-337 in 1994
FBI New York City	1988 - 1993	Relocation bonuses and Retention Allowances	Expired (Not a chapter 47 demo project - authorized by legislation)
FAA Airway Science Curriculum	1983 - 1992	Alternative recruitment method	Expired
Pacer/Share Air Force Sacramento Air Logistics and Defense	1988-1993	Broadbanding Integrated GS/GM/FWS supervisors pay organizational Performance system	Expired

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